TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted]51.

JAMES S. McKEE, NELLIE CANON BLIVEN, EXECUTRIX OF WILLIAM E. BLIVEN, DECEASED, AND McKEE & BLIVEN BUTTON COMPANY, PETITIONERS,

vs.

BENJAMIN GRATZ.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 4, 1921.

CERTIORARI AND RETURN FILED MAY 21, 1921.

(28,203)

(28,203)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 282.

JAMES F. McKEE, NELLIE CANON BLIVEN, EXECUTRIX OF WILLIAM E. BLIVEN, DECEASED, AND McKEE & BLIVEN BUTTON COMPANY, PETITIONERS,

vs.

BENJAMIN GRATZ.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Caption to transcript from U. S. circuit court of appeals	*a*	1
Writ of error and clerk's return	1	1
Citation and acknowledgment of service	2	2
Caption to transcript from U. S. district court	3	3
Præcipe for transcript	4	3
Record entry of the filing of transcript of record on removal	6	5
Transcript from circuit court, City of St. Louis, Missouri	6	6
Amended petition	7	6
Supplemental affidavit	9	8
Record entry of the filing of demurrer to the petition	10	9
Defendants' demurrer to the petition	10	9
Record entry of the filing of motions to make petition more definite and certain and to require plaintiff to elect on which cause of action he will proceed	11	10

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 6, 1921.

	Original.	Print.
Motion to make petition more definite and certain	11	10
Motion to require plaintiff to elect on which cause of action he will proceed	12	10
Order, January 6, 1917, denying motion to require plaintiff to elect, etc., and sustaining motion to make petition more definite and certain	12	11
Record entry of the filing of amended petition	13	11
Amended petition	13	12
Record entry of the filing of defendants' motion for a repleader	16	14
Defendants' motion for a repleader	16	14
Order overruling defendants' motion for a repleader, etc.	17	15
Answer	17	15
Record entry of the filing of motion to strike out part of answer	18	16
Plaintiff's motion to strike out part of answer	18	16
Order sustaining motion to strike out part of answer; record entry of the filing of reply	19	16
Reply	19	17
Record entry of the filing of amended answer	19	17
Amended answer	19	17
Record entry of the filing of motion to strike out parts of amended answer, etc	20	18
Motion to strike out parts of amended answer	20	18
Reply to amended answer	21	18
Order sustaining motion for production of certain papers	21	19
Motion to strike out certain parts of amended answer sustained; jury impaneled; trial, May 27, 1918	23	20
Trial, May 28, 1918; motion to require plaintiff to elect on which cause of action he will proceed overruled	23	21
Motion to require plaintiff to elect on which cause of action he will proceed	24	21
Plaintiff's motion for judgment, etc., filed May 29, 1918	24	21
Trial; verdict and judgment, May 29, 1918	24	22
Order overruling motion for new trial and extending time for bill of exceptions	25	23
Order, September 10, 1918, extending time for bill of exceptions	26	23
Record entry of the filing of bill of exceptions	26	23
Bill of exceptions	26	24
Caption	26	24
Testimony for plaintiff	27	24
Testimony of Benjamin Gratz	27	24
Plaintiff's exhibits	27	25
1 and 2—Photolithographic plats of township 20 north, range 11, and of township 20 north, range 12 east, of the 5th principal meridian, Pemiscot County, Missouri, Narrative statement of	27	25

	Original.	Print.
Plaintiffs' Exhibit 3—Certified copy from the tract book on file in the U. S. land office at Springfield, Missouri, Narrative statement of	28	25
4—Certified copy of patent from the State of Missouri to Pemiscot County, Missouri, Narrative statement of	29	26
5—Certified copy of patent from the State of Missouri to Pemiscot County, Missouri, Narrative statement of	29	26
6—Certified copy of patent, Pemiscot County, Missouri, to St. Louis Trust Co., November 9, 1903, Narrative statement of	30	26
7—Certified copy of patent, Pemiscot County, Missouri, to Himmelberger-Lace Land & Lumber Co., May 8, 1900, Narrative statement of	30	27
8—Certified copy of quit-claim deed to Himmelberger-Harrison Lumber Co., July 13, 1903, Narrative statement of	31	27
9 and 10—Assignments of causes of action from the St. Louis Union Trust Co. and the Himmelberger-Harrison Lumber Co. to Mr. Gratz, August 6, 1914, Narrative statement of	31	28
Testimony of F. C. Freiburg	32	29
Plaintiff's Exhibit 11—Statement of mussel shells forwarded from Pascola, Mo., account of Wardell, Mo., consigned to McKee & Bliven Button Company, Muscatine, Iowa, during 1913 and 1914	33	30
Deposition of Bruce C. Hightower	33	31
J. E. McClung	34	31
M. O. Hickerson	45	41
Plaintiff's exhibits	52	47
12—Letter to McKee & Bliven Button Co., June 14, 1912	52	47
13—Letter, Jayne & Hoffman to Barclay, Orthwein & Wallace, July 9, 1914	53	48
14—Bill of lading issued by St. Louis & San Francisco Ry. Co. to William A. Blake, August 4, 1914, Narrative statement of	54	49
15—Letter, McKee & Bliven Button Co. to M. N. & S. Ry., August 21, 1914	55	49
Certain interrogatories addressed by plaintiff to defendants and answers in a former trial of this case in the U. S. district court for the southern district of Iowa, Davenport division	55	50

	Original.	Print.
Jake Lemkau *et al.*, offer of depositions	57	51
Deposition of James S. McKee	57	51
Colloquy between court and counsel	67	61
Testimony for defendant	69	62
Testimony of James S. McKee	69	62
Testimony of Ella Reuling	77	70
Defendants' motion for a directed verdict presented and ruling thereon deferred; motion to require plaintiff to elect overruled and exceptions thereto	83	76
Testimony for defendants	84	76
Testimony of James S. McKee	84	76
W. A. Blake	93	85
James Figg	100	91
G. H. Ohlsen	109	99
Arthur D. Howard	113	103
E. M. Dennison	115	105
Henry F. Kath	116	106
Leon Lemaire	118	108
Testimony for plaintiff in rebuttal	119	109
Testimony of J. E. McClung (recalled)	119	109
Plaintiff's Exhibit 16—Ledger sheets showing the account of McKee & Bliven Button Co. with James Figg, May 20 to September 11, 1913	121	111
Plaintiff's Exhibit 17—Ledger sheets showing the account of McKee & Bliven Button Co. with William A. Blake, August 8, 1913, to November 20, 1917	123	115
Plaintiff's motion for judgment because of defendants' failure to comply with order of court to produce, etc.	124	119
Memorandum opinion of the district court and peremptory instruction for a verdict and exceptions thereto	124	119
Verdict, Recital of	127	121
Plaintiff's motion for a new trial	127	122
Certificate of judge to bill of exceptions	128	122
Order allowing writ of error, etc	128	122
Assignment of errors	129	123
Petition for and order allowing writ of error	133	126
Bond on writ of error	133	127
Clerk's certificate to transcript	134	128
Appearance of counsel for plaintiff in error	136	128
Appearance of Mr. Lon O. Hocker and Mr. George F. Haid as counsel for defendants in error	136	129
Appearance of Messrs. Hoffman & Hoffman as counsel for defendants in error	137	129
Order of submission, January 30, 1919	137	129
Opinion, April 28, 1919	138	129
Judgment, April 28, 1919	145	134
Petition for a rehearing	146	134
Order, November 17, 1919, granting petition for rehearing, vacating judgment of April 28, 1919, and restoring cause to docket for reargument	159	142

	Original.	Print.
Order, January 14, 1920, passing case to foot of call for January 15, 1920	159	142
Order of resubmission, January 19, 1920	160	142
Opinion, November 13, 1920	161	143
Judgment, November 22, 1920	173	151
Petition of defendants in error for rehearing	174	152
Petition of plaintiff in error for modification of opinion or rehearing	177	153
Response to petition of plaintiff in error for modification of opinion, etc	182	156
Per curiam opinion on petitions for rehearing	187	158
Order denying petitions for rehearing, etc	190	159
Motion for stay of mandate	190	160
Order staying mandate	191	160
Clerk's certificate	192	160
Writ of certiorari and return	193	161

a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the first day of October, A. D. 1918, a transcript of record pursuant to a writ of error directed to the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein Benjamin Gratz was Plaintiff in Error and James S. McKee, et al., were Defendants in Error, which said transcript as prepared and printed, under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 (*Writ of Error and Clerk's Return.*)

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the March Term, 1918, thereof, between Benjamin Gratz, plaintiff, and James S. McKee, Nellie Canon Bliven, executrix of William E. Bliven, deceased, McKee & Bliven Button Company, defendants, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 22nd day of November, 1918, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable David P. Dyer, Judge of the District Courts of the United States within and for the Eastern Dis-
2 trict of Missouri, this 23rd day of September in the year of our Lord one thousand nine hundred and eighteen.

Issued at office in the City of St. Louis, with the seal of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, dated as aforesaid.

[Seal U. S. Dist. Court, Eastern Division, East. Jud. Dist. of Mo.]

W. W. NALL,
Clerk District Court United States,
Eastern Division of the Eastern
Judicial District of Missouri,
By IRVINE MITCHELL,
Deputy.

Allowed by:
DAVID P. DYER,
Judge.

Return to Writ.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

In obedience to the com-and of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said District Court, at office in the City of St. Louis, Mo., this 1st day of October, A. D. 1918.

[Seal U. S. Dist. Court, Eastern Division, East. Jud. Dist. of Mo.]

W. W. NALL,
Clerk of said Court,
By OTTO O. FICKEISSEN,
Deputy Clerk.

Endorsed: Filed in the District Court on Sept. 23, 1918.

(*Citation and Acknowledgment of Service.*)

The United States of America to James S. McKee, Nellie Canon Bliven, Executrix of William E. Bliven, deceased, McKee & Bliven Button Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit, at
3 St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the

Clerk's office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein Benjamin Gratz is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable David P. Dyer, Judge of the District Court of the United States for the Eastern District of Missouri, this 23rd day of September in the year of our Lord one thousand nine hundred and eighteen.

DAVID P. DYER,
United States District Judge,
for the Eastern District of Missouri.

Service of the foregoing Citation acknowledged, this Sept. 23, 1918.

JONES, HOCKER, SULLIVAN & ANGERT,
HOFFMAN & HOFFMAN,
Of Counsel for Defendants in Error.

Endorsed: Filed in the District Court on Sept. 23, 1918.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

In the District Court of the United States in and for said Division of said District.

Be it remembered, That heretofore, towit, on the 23rd day of September, A. D. 1918, there was filed in cause number 4593 of Benjamin Gratz, Plaintiff, vs. McKee and Bliven Button Company, J. S. McKee and W. E. Bliven, Defendants, a certain præcipe for transcript on writ of error, which said præcipe is in words and figures as follows, to-wit:

4 (*Præcipe for Transcript.*)

No. 4593.

BENJAMIN GRATZ, Plaintiff,

vs.

MCKEE & BLIVEN BUTTON COMPANY et al., Defendants.

To the Honorable the Clerk of said District Court:

You are requested by the plaintiff in the above entitled cause to copy the record of same, for transmission to the United States Circuit Court of Appeals, Eighth Circuit, in accordance with the following specifications:

1. Copy this Præcipe.

2. Copy the order (of June 27, 1916) filing the transcript of this cause on removal from the Circuit Court, City of St. Louis, Missouri.

3. Do not copy any portion of said removal-transcript except the amended petition, filed by plaintiff in said State court on May 4, 1916, which said amended petition (caption and signature included) you are requested to copy, together with a notation, preceding same, as follows:

(This action was instituted in the Circuit Court, City of St. Louis, Missouri, on April 24, 1916, by the filing of a petition and affidavit for attachment, and was thereafter duly removed into the District Court of the United States, Eastern District of Missouri, by the defendants, on the ground of diverse citizenship of the parties; and there appears in said transcript of record on removal an amended petition of plaintiff, filed in said Circuit Court on May 4, 1916, as follows):

4. Copy order (of July 12, 1916) filing defendants' demurrer; also copy said demurrer, including caption and signatures.

5. Copy order (of Nov. 6, 1916) filing motion to elect and motion to make definite and certain; also copy said motions, omitting captions and signatures.

6. Copy order (of Jan. 6, 1917) denying motion to elect and sustaining motion to make more definite and certain.

7. Copy order (of Jan. 15, 1917) filing the amended petition of plaintiff; also copy said amended petition as finally amended by interlineation (omitting caption and signature), and precede same by the following notation:

(Amended Petition as filed on January 15, 1917; and as amended, by interlineation, on March 13, 1917, when the words "in no part of which lands any of defendants or said Wm. E. Bliven at any time had any interest, right or estate" were inserted in the fifth paragraph of the first count, and as also amended, by interlineation, on May 29, 1918, when the words "and was in possession of" were inserted in the second and third paragraph of said first count thereof).

8. Copy order (of Jan. 18, 1917) filing motion for repleader; also copy said motion, omitting caption and signature.

9. Copy order (of Mar. 13, 1917) overruling motion for repleader and order filing defendants' answer; also copy said answer, omitting caption and signature.

10. Copy order (of Mar. 15, 1917) filing motion to strike out part of answer; also copy said motion, omitting caption and signature.

11. Copy order (of Mar. 26, 1917) sustaining motion to strike, and filing reply; also copy of said reply, omitting caption and signature.

12. Copy order (of Mar. 28, 1917) filing amended answer; also copy said answer, omitting caption and signature.

13. Copy order (of Mar. 30, 1917) filing motion to strike out parts of the amended answer and filing reply to amended answer; also copy said motion and said reply, omitting captions and signatures.

14. Copy order (of May 23, 1918) filing and sustaining motion for production of papers; also copy this order (which includes said motion).

15. Copy orders (of May 27, 1918) sustaining motion to strike out parts of the amended answer, and impaneling jury.

16. Copy order (of May 28, 1918) concerning progression of trial, and filing and overruling of defendants' motion to elect; also copy said motion to elect, omitting caption and signature.

17. Copy order (of May 29, 1918) filing plaintiff's motion for judgment; also copy said motion, omitting caption and signature.

18. Copy verdict and judgment (of May 29, 1918) omitting captions.

19. Copy order (of May 29, 1918) filing motion for new trial.

20. Copy order (of May 30, 1918) overruling motion for new trial and allowing time for filing bill of exceptions.

6 21. Copy order (of —— —, 1918) allowing and filing Bill of Exceptions; filing Assignment of Errors, Petition for Writ of Error and Bond; allowing Writ of Error, approving Bond and directing issuance of Citation; filing Election and Præcipe for transcript.

22. Copy Bill of Exceptions (omitting caption).

23. Copy Assignment of Errors, Petition for and allowance of Writ of Error, and Bond (including captions, endorsements and signatures).

24. Attach—original Writ of Error and return thereto, and Citation and service thereof.

25. Attach certificate of District Clerk to transcript.

BARCLAY & WALLACE,
Of Counsel for Plaintiff.

Copy of foregoing Præcipe received this 23d day of September, 1918. We do not intend to file and præcipe.

JONES, HOCKER, SULLIVAN & ANGERT,
HOFFMAN & HOFFMAN,
Of Counsel for Defendants.

Endorsed: Filed in the District Court on Sept. 23, 1918.

(*Record Entry, June 27, 1916, of the Filing of Transcript of Record on Removal.*)

Now at this day come the said defendants herein and file a transcript of the record on removal of this cause from the Circuit Court, City of St. Louis, Missouri.

June 27, 1916.

DAVID P. DYER,
Judge.

(*Transcript from Circuit Court, City of St. Louis, Missouri.*)

This action was instituted in the Circuit Court, City of St. Louis, Missouri, on April 24, 1916, by the filing of a petition and affidavit for attachment, and was thereafter duly removed into the District Court of the United States, Eastern District of Missouri, by the defendants, on the ground of diverse citizenship of the parties; and there appears in said transcript of record on removal an amended petition of plaintiff, filed in said Circuit Court on May 4, 1916, as follows:

7 (*Amended Petition.*)

CITY OF ST. LOUIS, *ss:*

In the Circuit Court, June Term, 1916.

No. 3404. (B.)

BENJAMIN GRATZ, Plaintiff,

vs.

McKEE & BLIVEN BUTTON COMPANY, JAMES S. McKEE, and NELLIE CANON BLIVEN, Executrix of William E. Bliven, Deceased, Defendants.

Amended Petition.

First Count.

1. Plaintiff, Benjamin Gratz, for his amended petition, filed by leave of Court, states that, at all times mentioned herein prior to the day in December, 1915, when William E. Bliven departed this life, the defendant James S. McKee and said William E. Bliven were partners doing a general merchandise and manufacturing business under the name of "McKee and Bliven Button Company", having its principal office and place of business at the City of Muscatine in the State of Iowa, and that the business thereof has since said day been and is now being so carried on at said place and elsewhere by said defendant McKee in the same firm name aforesaid, or by said McKee and the executrix of said Bliven (hereinafter mentioned) in said

firm name; and plaintiff is unable at this time to state which of said alternatives is the fact but avers that one or the other is the fact; and that defendant, Nellie Canon Bliven, widow of said deceased Bliven, has been duly appointed and has duly qualified as executrix of the estate of said William E. Bliven, deceased, and that all of said defendants are now, and at and before the time of the filing of the petition in this action were, non-residents of the State of Missouri.

2. Plaintiff states that, at all times mentioned herein, St. Louis Union Trust Company, a corporation under the laws of the State of Missouri, owned certain lands in the County of Pemiscot, Missouri, located largely in Sections 23, 24, 25, 26, and 27, Township 20, Range 11, and in Sections 17, 18, 19, 20, 21, and 30, Township 20, Range 12 and that Himmelberger-Harrison Lumber Company, a Corporation also organized under the laws of the State of Missouri, owned certain other lands in said section 25, Township 20, Range 11 in said County, which lands of said Lumber Company were within an area nearly surrounded by the said Trust Company's lands.

8 3. Plaintiff further states that, during the years 1913 and 1914, in said County of Pemiscot, Missouri, said McKee and said Bliven, deceased, doing business as aforesaid, wilfully, wrongfully and illegally took and carried away to said City of Muscatine, Iowa, three hundred seven and one-half (307½) tons of mussel shells from said described lands and converted said shells to their own uses and purposes, which converted property became and was then and there in their possession of the value of Twenty-Eight thousand, two hundred and ninety dollars ($28,290.) whereby said firm and each of said members thereof severally and jointly became jointly and severally liable therefor, as herein prayed.

4. Plaintiff further states that on August 6, 1914, said Trust and Lumber Companies assigned to plaintiff their said rights and causes of action herein above set forth, and accrued and accruing to said Trust and Lumber Companies in and to said property on account of the facts herein alleged.

Wherefore plaintiff, by reason of the facts aforesaid, has sustained damages caused by said defendants in the sum of Twenty-eight thousand two hundred ninety dollars ($28,290), for which amount with interest thereon from the — day of August, 1914, when demand on said defendant McKee and said William E. Bliven was made) the plaintiff prays judgment against defendants and for his costs.

Second Count.

The plaintiff, Benjamin Gratz, refers to and makes the first, second, third and fourth paragraphs of the foregoing count of this petition a part of this the second count thereof; and further states that said McKee and said Bliven, deceased, without the consent or authority of plaintiff or of the owners of said lands wilfully, wrongfully and illegally dug up therefrom and carried away and converted

said shells as aforesaid, which said shells were at the time a part of the realty of said lands growing thereon and a part thereof, and that neither said McKee nor said Bliven, deceased, had any interest or right in any of said lands or in any of said shells and that, under the statute in such case made and provided, to-wit: Section 5448 of the Revised Statutes of Missouri (1909) which plaintiff pleads, said McKee and said Bliven, deceased, became and said McKee and said executrix are now, liable to plaintiff in treble the said value of said converted property. Wherefore plaintiff, by reason of the facts set forth, has been damaged by said defendants in the sum of Twenty-eight thousand two hundred and ninety dollars ($28,290.)
9 and plaintiff prays that, in virtue of the aforesaid statute in such case made and provided, plaintiff have and be adjudged to recover treble the amount of his said damages, and that plaintiff have judgment accordingly and for his costs.

BARCLAY AND WALLACE,
Attorneys for Plaintiff.

(*Supplemental Affidavit of S. Mayner Wallace.*)

STATE OF MISSOURI,
City of St. Louis, ss:

Affiant, S. Mayner Wallace, of lawful age, being first duly sworn, states that he is attorney and agent for the plaintiff, Benjamin Gratz, in the above entitled cause, and that as such he, the affiant, is authorized to and does make this [*affiant*] for said plaintiff:

Affiant says that he has good reason to believe and does believe and therefore states that the defendant, James S. McKee, who is the same person referred to in prior proceedings herein as J. S. McKee, and one William E. Bliven, who is the same person heretofore referred to as W. E. Bliven and who died in the Month of December 1915, were at all times theretofore, as set forth in the pleadings in this cause partners doing business under the name of "McKee & Bliven Button Company" with their principal office and place of business at the City of Muscatine in the State of Iowa; that the defendant, Nellie Canon Bliven, has qualified as and is Executrix of the Estate of said William E. Bliven, deceased.

Affiant further states that, at the time this action was filed, said plaintiff in said cause had, and has now a just demand against said defendants therein, then and now due, and that the amount which affiant believes the said plaintiff ought to recover, after allowing all just credits and set offs, was and is more than the sum of Twenty-eight thousand two hundred ninety dollars ($28,290) and that both of said defendants are now, and at and before the commencement of this action were, non-residents of the State of Missouri and could not and cannot be served in this State in the manner prescribed by law by writ of summons.

S. MAYNER WALLACE.

Subscribed and Sworn to before me by the above named affiant, at the City of St. Louis, Missouri, this 4th day of May, 1916.

[SEAL.] CHAS. R. GRAVES,
Clerk of said Court.

(Record Entry, July 12, 1916, of the Filing of Demurrer to the Petition.)

Now at this day come the said defendants by attorneys, and file their joint demurrer to the petition of plaintiff in this cause.

(July 12, 1916.

DAVID P. DYER, *Judge.*

(Demurrer to the Petition.)

In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

No. 4593.

BENJAMIN GRATZ, Plaintiff,

vs.

McKEE & BLIVEN BUTTON COMPANY, JAMES S. McKEE, and NELLIE Canon Bliven, Executrix of William E. Bliven, Deceased, Defendants.

Come now the defendants in the above entitled cause and demur to count one of plaintiff's petition for the following reasons:

1. Several causes of action have been improperly united in the first count of said petition.

2. Said count does not state sufficient facts to constitute a cause of action against the defendants.

3. The plaintiff has no legal capacity to sue. And defendants demur to count two of said petition for the following reasons:

1. Several causes of action have been improperly united in the second count of said petition.

2. Said count does not state sufficient facts to constitute a cause of action against the defendants.

3. The Plaintiff has no legal capacity to sue.

HOFFMAN & HOFFMAN,
JONES, HOCKER, SULLIVAN & ANGERT,
Attorneys for Defendants.

Indorsed: Filed Jul. 12, 1916.
W. W. NALL, *Clerk.*

11 (*Record Entry, November 6, 1916, of the Filing of Motions to Make Petition More Definite and Certain and to Require Plaintiff to Elect on Which Cause of Action He Will Proceed.*)

Now at this day come the said defendants by attorney, and file a motion to make more definite and certain, and also a motion to elect, in this cause.

November 6, 1916. DAVID P. DYER,
Judge.

(*Motion to Make Petition More Definite and Certain.*)

And now come the defendants above named and respectfully show to the Court:

First. That the first count of plaintiff's petition herein is indefinite and uncertain in that it does not allege or state what lands belonged to the St. Louis Union Trust Company and upon which these defendants are alleged to have entered and removed property.

Second. Said first count of said petition does not state with sufficient definiteness and certainty what lands are alleged to have belonged to Himmelberger-Harrison Lumber Company and upon which these defendants are alleged to have entered and removed property.

Wherefore, the defendants move the Court to compel the plaintiff to make the first count of his petition more definite and certain in the matters and things stated.

And said defendants further show to the Court as follows, to-wit:

First. That the second count of plaintiff's petition herein is indefinite and uncertain in that it does not allege or state what lands belonged to the St. Louis Union Trust Company and upon which these defendants are alleged to have entered and removed property.

Second. Said second count of said petition does not state with sufficient definiteness and certainty what lands are alleged to have belonged to Himmelberger-Harrison Lumber Company and upon which these defendants are alleged to have entered and removed property.

Wherefore, the defendants move the Court to compel the plaintiff to make the second count of his petition more definite and certain in the matters and things stated.

Endorsed: Filed Nov. 6, 1916, W. W. Nall, Clerk.

12 (*Motion to Require Plaintiff to Elect on Which Cause of Action He Will Proceed.*)

And now come the defendants herein, James S. McKee and Nellie Canon Bliven, executrix of William E. Bliven, deceased, and respect-

fully show to the Court that the plaintiff has mingled in the first count of his petition herein an alleged cause of action alleged to have been assigned to him by the St. Louis Union Trust Company with another alleged cause of action alleged to have been assigned to the plaintiff by Himmelberger-Harrison Lumber Company.

Defendants, therefore, move the Court to compel the plaintiff to elect which of said two causes of action the plaintiff will proceed with and to strike the other from the first count of the petition.

And the defendants further show to the Court that in the second count of the plaintiff's petition he has mingled an alleged cause of action alleged to have been assigned to him by the St. Louis Union Trust Company with another alleged cause of action alleged to have been assigned to the plaintiff by Himmelberger-Harrison Lumber Company.

Defendants, therefore, move the Court to compel the plaintiff to elect which of said two causes of action the plaintiff will proceed with and to strike the other from the second count of the petition.

Endorsed: Filed Nov. 6, 1916, W. W. Nall, Clerk.

(Order, January 6, 1917, Denying Motion to Require Plaintiff to Elect, etc., and Sustaining Motion to Make Petition More Definite and Certain.)

Now at this day come the parties hereto by their respective attorneys, and argue and submit to the Court the motion of defendant to require an election in this cause, and also the motion of defendant to make more definite and certain the petition of plaintiff herein, upon due consideration whereof the Court doth

Order that the said motion to elect be and the same is hereby denied, to which ruling the defendant excepts; and that the motion to make more definite and certain be and the same is hereby sustained, to which ruling the said plaintiff excepts.

January 6", 1917. DAVID P. DYER,
Judge.

13 *(Record Entry, January 15, 1917, of the Filing of Amended Petition.)*

Now at this day comes the said plaintiff by attorney, and files an amended petition in this cause.

Jany. 15, 1917. DAVID P. DYER,
Judge.

"Amended Petition as filed on January 15, 1917, and as amended, by interlineation, on March 13, 1917, when the words "in no part of which lands any of defendants or said Wm. E. Bliven at any time had any interest, right or estate" were inserted in the fifth paragraph of the first count, and as also amended, by interlineation, on May 29, 1918, when the words "and was in possession of" were inserted in the second and third paragraph- of said first count thereof).

Amended Petition.

First Count.

1. Plaintiff, Benjamin Gratz, for amended petition, states that, at all times mentioned herein prior to the day in December, 1915, when William E. Bliven departed this life, the defendant, James S. McKee, and said William E. Bliven, were partners doing a general merchandise and manufacturing business under the name of "McKee & Bliven Button Company" with its principle office and place of business at the City of Muscatine in the State of Iowa; that the business of said Company has since said day been and is now being so carried on at said place and elsewhere by said defendant McKee in the same firm name aforesaid, or by said McKee and the executrix of said Bliven (hereinafter mentioned) in said firm name; that plaintiff is unable at this time to state which of said alternatives is the fact but avers that one or the other is the fact; that defendant, Nellie Canon Bliven, widow of said deceased Bliven, has been duly appointed and has duly qualified as executrix of the estate of said William E. Bliven; that all of said defendants are now, and before the time of the filing of the petition in this action were, non-residents of the State of Missouri and residents and citizens of a State or States of the United States of America other than Missouri; and that the plaintiff is and during all times herein mentioned has been a citizen of said State of Missouri.

2. Plaintiff states that St. Louis Union Trust Company is and at all times herein mentioned has been a corporation organized under the general laws of the State of Missouri for the formation of
14 trust companies and a citizen of said State; and that, at all times mentioned herein, said Trust Company owned and was in possession of certain lands in the County of Pemiscot, Missouri, located and described, according to United States Government Survey as follows, to-wit:

Lot 1 in the S. E. ¼ of Sec. 23; Lots 1 in S. W. ¼ and 2 in S. E. ¼ of Sec. 24; Lots 14 and 15 in N. E. ¼, 16 in S. W. ¼ and 17 in S. E. ¼ of Sec. 25; Lots 1 in N. E. ¼, 2 in N. W. ¼, 3 in S. W. ¼ and 4 in S. E. ¼ of Sec. 26, and Lots 12 in N. E. ¼, 13 in S. E. ¼ and 14 in S. W. ¼ of Sec. 27, all in Township 20, Range 11; also Lots 1 in N. E. ¼, 2 in S. E. ¼ and 3 in S. W. ¼ of Sec. 17; Lot 3 in S. E. ¼ of Sec. 18; Lots 15 in N. E. ¼, 16 in S. W. ¼, 17 and 18 in S. E. ¼ of Sec. 19; Lots 1 in N. E. ¼, 2 in N. W. ¼ and 3 in S. E. ¼ of Sec. 20; Lots 1 in N. E. ¼ 2 in N. W. ¼ 3 in S. W. ¼ and 4 in S. E. ¼ of Sec. 21 and Lots 3 in N. E. ¼ and 4 in N. W. ¼ of Sec. 30, all in Township 20, Range 12. Said lands comprise approximately 1,314 acres.

3. Plaintiff states that Himmelberger-Harrison Lumber Company is and at all times herein mentioned has been a business corporation organized under the general laws of the State of Missouri and a citizen of said State; and that, at all times mentioned herein, said

Lumber Company owned and was in possession of certain lands in the County of Pemiscot, Missouri, located and described, according to United States Government Survey, as follows, to-wit: Lot 13 in N. W. ¼ of Sec. 25, Township 20, Range 11, comprising about 125 acres.

Said lands of said Lumber Company are bounded on the east and west by the lands of said Trust Company above described, and, taken together, the aforesaid lands of said Trust and Lumber Companies form a continuous tract of land, much greater in length than width, extending from a northeasterly to a southwesterly direction through said County of Pemiscot, Missouri.

4. Plaintiff further states that, during the years 1913 and 1914, in said County of Pemiscot, Missouri, said McKee and said William E. Bliven, doing business as aforesaid, wilfully wrongfully and illegally took and carried away to said City of Muscatine, Iowa, three hundred seven and one-half (307½) tons of mussel shells from said lands, and that said McKee and William E. Bliven, doing business as hereinbefore described, converted said shells to their own uses and purposes, which converted property became and was
15 then and there in their possession of the value of Twenty-eight thousand, two hundred ninety Dollars ($28,290.) whereby said firm and each of said members thereof, severally and jointly, became jointly and severally liable therefor, as herein prayed. Plaintiff states that said shells were taken from all of said lands of said Trust and Lumber Companies and that the same were collected at and shipped from a railroad station called Wardell which is located within the area of said land of said Lumber Company.

5. Plaintiff further states that, on or about August 6, 1914, said Trust and Lumber Companies assigned to plaintiff their said rights and causes of action hereinabove set forth, accrued theretofore, and accruing during the year 1914, to said Trust and Lumber Companies because and on account of the facts herein alleged; and plaintiff prosecutes this action for recovery for the conversion of all of said shells so taken from all of said lands hereinbefore described, in no part of which lands any of defendants or said Wm. E. Bliven at any time had any interest, right or estate.

Wherefore, Plaintiff, by reason of the facts aforesaid, has sustained damages in the sum of Twenty-eight thousand two hundred ninety Dollars ($28,290) for which amount with interest thereon from August, 1914, (when demand on said defendant McKee and said William E. Bliven was made) the plaintiff prays judgment against said defendants and each of them and for costs.

Second Count.

The plaintiff, Benjamin Gratz, refers to and makes the first, second, third, fourth and fifth paragraphs of the foregoing count of this petition a part of this, the second count hereof; and further states that said McKee and said William E. Bliven, without the consent or authority of plaintiff or of the owners of said lands, wilfully,

wrongfully, and illegally gathered, dug up therefrom, and carried away and converted to their own use said shells as aforesaid, which said shells were then and theretofore a part of the realty of said lands growing thereon and forming and constituting a part thereof, and that neither said McKee nor said William E. Bliven had any interest or right in any of said lands or in any of said shells; and that, under the statute in such case made and provided, to-wit: Section 5448 of the Revised Statutes of Missouri (1909) which plaintiff hereby pleads in that behalf, said McKee and said William E. Bliven became, and said McKee and said executrix are now
16 liable to plaintiff in treble the said value of said converted property, because of the facts aforesaid.

Wherefore, by reason of the facts above set forth, plaintiff has been damaged in the sum of Twenty-eight thousand two hundred and ninety dollars ($28,290) and an action hath accrued to plaintiff, by virtue of the aforesaid statute in such cases made and provided, to have and recover of said defendants and each of them treble the amount of his said damages, for which amount $84,870, and interest) plaintiff prays judgment accordingly, and for his costs.

Indorsed: Filed Jan. 15, 1917, W. W. Nall, Clerk.

(*Record Entry, January* 18, 1917, *of the Filing of Defendants' Motion for a Repleader.*)

Now at this day come the said defendants by attorneys, and file a motion for a repleader in this cause.

Jany. 18/1917.

DAVID P. DYER,
Judge.

(*Defendants' Motion for a Repleader.*)

And now come the defendants in the above entitled cause and respectfully show to the Court that notwithstanding the order heretofore made by the Court on the plaintiff to separately plead his alleged causes of action, he has in his amended petition and in each count thereof, united an alleged [caused] of action alleged to have been assigned to him by the St. Louis Union Trust Company with another alleged cause of action alleged to have been assigned to him by the Himmelberger-Harrison Lumber Company.

Wherefore, the defendants pray that the plaintiff be compelled to restate his cause of action so as to state separately the alleged cause of action claimed to have been assigned to the plaintiff by the St. Louis Union Trust Company from the alleged cause of action alleged to have been assigned to him by the Himmelberger-Harrison Lumber Company, with appropriate averments with respect to each cause of action as to the damages claimed from the defendants in each;

and that similar orders be made with respect to each count of the plaintiff's petition.

Indorsed: Filed Jan. 18, 1917, W. W. Nall, Clerk.

17 (*Order, March* 13, 1917, *Overruling Defendants' Motion for a Repleader, etc.*)

Now at this day come the parties hereto by their respective attorneys and argue and submit to the Court the motion of defendants for a re-pleader in this cause, upon due consideration whereof the Court doth order that the said motion be and the same is hereby overruled, to which ruling the said defendants except.

And now the said plaintiff by leave of Court, amends by interlineation his amended petition in this cause by inserting in subdivision 5 of the First Count on page 3 of said petition, after the word "described", the words, "in no part of which lands any of defendants or said Wm. E. Bliven at any time had any interest, right or estate."

And now the defendants, James S. McKee and Nellie Canon Bliven, Executrix of William E. Bliven, file their joint answer to said petition as so amended.

March 13, 1917.

DAVID P. DYER,
Judge.

(*Answer.*)

And now come the defendants James S. McKee and Nellie Canon Bliven, Executrix of William E. Bliven, deceased, and for answer to the amended petition of the plaintiff herein deny each and every allegation therein contained.

For other and further answer and defense the defendants say that the only mussel shells coming from Pemiscot County, or any part thereof, which defendants or the partnership of McKee and Bliven Button Company ever acquired or had in possession in any way, were purchased by them in the open market from persons in possession thereof and apparently owners of the same, and for which they paid these apparent owners full value, without knowledge or notice that the plaintiff's alleged assignors, or either of them, had or claimed any right, title or interest therein or thereto, if, in fact, said assignors had or claimed such. And defendants further say that any mussel shells which were ever taken by any person from the lands of the plaintiff's assignors, or either of them, were taken with the knowledge of plaintiff's said assignors and each of them and of their agents and that plaintiff's said assignors and each of them are estopped to claim any sum for damages for the taking thereof from any person.

18 Wherefore, having fully answered, said defendants ask to be hence discharged with their costs.

Indorsed: Filed Mar. 13, 1917, W. W. Nall, Clerk.

(Record Entry, March 15, 1917, of the Filing of Motion to Strike Out Part of Answer.

Now at this day comes the plaintiff herein by attorney, and files a motion to strike out parts of defendants' answer in this cause.

March 15, 1917.
DAVID P. DYER,
Judge.

Plaintiff's Motion to Strike Out Part of Answer.

Comes again the plaintiff and moves the Court to strike out that part of answer of defendants herein, beginning with the words: "And defendants further say", (on the first page thereof on the third line from the bottom) and ending with the words: "from any person" (on the second page of the answer, on the third line from the top of said page) said passage being as follows:

"And defendants further say that any mussel shells which were ever taken by any person from the lands of the plaintiff's assignors, or either of them, were taken with the knowledge of plaintiff's said assignors and each of them and of their agents, and that plaintiff's said assignors and each of them are estopped to claim any sum for damages for the taking thereof from any person."

And for the grounds and reasons of this motion plaintiff specifies the following:

1. Because said part of said answer is redundant and irrelevant.

2. Because said part of said answer does not constitute any defense to the action;

3. Because said part of said answer is immaterial to the issues in the cause.

For each of said reasons above assigned, plaintiff prays that said part of said answer be stricken out.

Indorsed: Filed Mar. 15, 1917, W. W. Nall, Clerk.

19 *(Order Sustaining Motion to Strike Out Part of Answer; Record Entry of the Filing of Reply.)*

The Court having fully considered the motion of plaintiff to strike out parts of the answer of defendants in this cause, doth order that the said motion be and the same is hereby sustained.
Memorandum of opinion filed.

And now comes the said plaintiff by attorney, and files his reply in this cause.

March 26th, 1917.

DAVID P. DYER,
Judge.

(*Reply.*)

For reply to the answer of defendants, plaintiff denies generally each and every allegation of said answer.

(Endorsed: "Filed Mar. 26, 1917, W. W. Nall, Clerk.")

(*Record Entry, March* 28, 1917, *of the Filing of Amended Answer.*)

Now come the said defendants by attorneys, and by leave of Court file an Amended Answer in this cause.

March 28th, 1917.

DAVID P. DYER,
Judge.

(*Amended Answer.*)

And now come the defendants, James S. McKee and Nellie Canon Bliven, executrix of William E. Bliven, deceased, and for amended answer to the amended petition of the plaintiff herein deny each and every allegation therein contained.

For other and further answer and defense the defendants say that the only mussel shells coming from Pemiscot County, or any part thereof, which these defendants or the partnership of McKee & Bliven Button Company ever acquired or had in possession in any way, were purchased by them in the open market from persons in possession thereof and apparently owners of the same, and for which they paid these apparent owners full value, without knowledge or notice that the plaintiff's alleged assignors, or either of them, had or claimed any right, title or interest therein or thereto, if, in fact, said assignors had or claimed such. And defendants further say that any of the mussel shells which were ever taken by any person from the lands of the plaintiff's assignors or either of them, were taken with the knowledge and consent of plaintiff's said assignors and each of them and their agents, and that plaintiff's said assignors and each of them are estopped to claim any sum for damages for the taking thereof by any person.

Wherefore, having fully answered, said defendants ask to be hence discharged with their costs.

(Endorsed: "Filed Mar. 28, 1917, W. W. Nall, Clerk.")

(*Record Entry, March 30, 1917, of the Filing of Motion to Strike Out Parts of Amended Answer, etc.*)

Now comes the said plaintiff by attorneys, and files a motion to strike out parts of the amended answer of defendants, and also a reply to the remaining parts of said answer.

March 30th, 1917.

DAVID P. DYER,
Judge.

(*Motion to Strike Out Parts of Amended Answer.*)

First Assignment.

Comes again the plaintiff and moves the Court to strike out that part of the amended answer of defendant comprising the words: "Knowledge and", on the third line of the second page thereof, for the reason that those words are [irrevelant] and redundant and constitute no defense, and were ordered stricken out by this Court on a prior motion of this nature.

Second Assignment.

2. Plaintiff further moves the Court to strike out the following words on the fifth, sixth and seventh lines of said amended answer, page two thereof, viz:

"And that plaintiff's said assignors and each of them are estopped to claim any sum for damages for the taking thereof by any person."

And plaintiff assigns as grounds of this Motion as to said plea that the same is not sufficient in law as a plea of estoppel, and because the same is a mere conclusion of law and does not state sufficient facts to constitute an estoppel, and is redundant and irrelevant.

Wherefore plaintiff prays that the said second part of said
21 amended answer above quoted be stricken out.

(Endorsed: Filed Mar. 30, 1917, W. W. Nall, Clerk.)

(*Reply to Amended Answer.*)

Plaintiff, for reply to so much of the amended answer herein as is not specified in the pending motions filed by plaintiff to strike out parts thereof, denies generally each and every allegation of said amended answer.

(Endorsed: Filed Mar. 30, 1917, W. W. Nall, Clerk.)

(Order, May 23, 1918, Sustaining Motion for Production of Certain Papers.)

Now at this day come the parties hereto by their respective attorneys, and the said plaintiff files and presents to the Court the motion for the production upon the trial of this cause of certain papers, upon due consideration whereof the Court doth

Order that the said motion be sustained and that the defendants, James S. McKee and Nellie Canon Bliven, Executrix of Wm. E. Bliven, Deceased, be required to produce upon the trial of this cause on May 27th, 1918, the following papers, to wit:

1. All Letters and telegrams, and copies of letters and telegrams (aside from the copies of the letters specified in No. 4 below) from or to the defendants or either of them (or the partnership of McKee & Bliven Button Company), on the one hand, and W. A. Blake, on the other hand, during the years 1913 and 1914, concerning the digging, purchase, sale, handling or value of the mussel shells in Pemiscot County, Mo., specified in the amended petition in this cause.

2. All letters and telegrams, and copies of letters and telegrams from or to the defendants or either of them (or said company), on the one hand, and Lee Cheek, on the other hand, during the years 1913 and 1914, concerning the digging, purchase, sale, handling or value of mussel shells in Pemiscot County, Mo., specified in the amended petition in this cause.

3. All letter and telegrams, and copies of letters and telegrams from or to the defendants or either of them (or said company), on the one hand, and James S. Figg, on the other hand, during the years 1913 and 1914, concerning the digging, purchase, sale, handling or value of mussel shells in Pemiscot County, Mo., specified in the amended petition in this cause.

22 4. Copies of the letters written by either of said defendants or by said company or any of its agents to said Blake, enclosing to the latter the following checks, drawn by said defendants or by said company on account of said shells:

Checks.

Date.	Amount.	Date.	Amount.
Aug. 8, 1913.....	$200.00	Aug. 29, 1913.....	$378.61
Aug. .., 1913.....	371.11	Sept. 12, 1913.....	281.78
Aug. 16, 1913.....	21.83	Sept. ..., 1913.....	16.50
Aug. 22, 1913.....	150.00	Sept. or Oct., 1913....	225.06
Aug. 23, 1913.....	265.71	Oct. ..., 1913.....	150.00

5. All expense accounts of said Figg, rendered to either of said defendants, or said Company, during said years, made in the matter

of obtaining said shells, showing the trips made by said Figg for that purpose and what he accomplished in said matter.

6. All expense accounts of said Blake, rendered to either of said defendants, or said Company, during said years, made in the matter of obtaining said shells, showing the trips made by said Blake for that purpose and what he accomplished in said matter.

7. All letters and telegrams, and copies of letter and telegrams, from or to either of said defendants, or said Company, on the one hand, and the Bank of Portageville, Mo. (or its officers) on the other hand, during said years, concerning the deposit of moneys for, or the extension of credits to, said Blake, Figg and Cheek, by defendants or said company in the matter of the digging, purchase, sale or handling of said shells.

8. The written report made by said Figg on said Blake, during said years, to said defendants or said company, concerning the digging of the shells mentioned in the amended petition in this cause; which report is stated by said defendant McKee to have been made.

9. The canceled checks, drawn by said defendants or said company, to the order of said Blake, during said years, in payment of the shells specified in the amended petition; which checks are admitted by said defendant McKee to have been so drawn.

10. The book accounts, between said defendants or said company and said Blake, showing amounts paid the latter for shells
23 from Pemiscot County during said years, and quantities of said shells received by them from said Blake during said time, with dates of payments and dates of receipt of shells.

May 23rd, 1918.

DAVID P. DYER,
Judge.

(Motion to Strike Out Certain Parts of Amended Answer Sustained; Jury Impaneled; Trial May 27, 1918.)

Now at this day come the parties hereto by their respective attorneys, and the Court having fully considered the motion of plaintiff to strike out parts of the amended answer to the amended petition of plaintiff in this cause, doth

Order that said motion to strike out be and the same is hereby sustained, to which ruling the said defendant excepts. And this cause having been heretofore set down for trial at this day and hour and the parties announcing themselves ready, comes also a jury, to wit:

Louis B. Tebbetts, Frank X. Gorley, Robert H. Cornell, Albert Weber, George T. Tatum, James Hayward, Alexander T. Averill, J. A. Stafford, George F. Coombs, E. Lansing Ray, W. N. Alexander, and Theo. W. Kisker,

twelve good and lawful men who having been duly drawn, summoned and chosen, are now sworn to well and truly try the issues herein joined and a true verdict render according to the law and the evidence. And now the introduction of evidence in this cause is commenced but not being concluded at the hour of adjournment, the further trial of this cause is postponed until the opening of Court tomorrow morning at 9:30 o'clock.

May 27th, 1918.

JOHN C. POLLOCK,
Judge.

(*Trial, May* 28, 1918; *Motion to Require Plaintiff to Elect on Which Cause of Action He Will Proceed Overruled.*)

Now at this day come again the parties hereto by their respective attorneys, and comes also the jury impaneled and sworn upon the trial of this cause as on yesterday; and now the introduction of evidence on behalf of the said plaintiff is resumed and concluded, and the said defendants file and present to the Court their motion to require plaintiff to elect between causes of action stated in his amended petition herein, upon due consideration whereof the Court doth

24 Order that said motion be and the same is hereby overruled, to which ruling the said defendants except; and now the introduction of evidence on behalf of said defendants is commenced and concluded and the introduction of evidence in rebuttal on behalf of the said plaintiff is commenced and concluded.

May 28th, 1918.

JOHN C. POLLOCK,
Judge.

(*Motion to Require Plaintiff to Elect on Which Cause of Action He Will Proceed.*)

Now come the defendants in the above entitled cause and move the Court to require the plaintiff to elect upon which of the two causes of action he proposes to rely upon in this case, for the reason that it is necessary that the defendants should know this fact before proceeding with the introduction of evidence in order that they may meet the respective issues presented by the petition as filed.

(Endorsed: Filed May 28, 1918, W. W. Nall, Clerk.)

(*Plaintiff's Motion for Judgment, etc. Filed May* 29, 1918.)

Plaintiff moves the court for an order striking out defendant's answer, or for a judgment as by default for plaintiff, because of defendants' failure to comply with the court's order for the production of papers pursuant to section 724 of the Revised Statutes of the United States.

(Endorsed: Filed May 29, 1918, W. W. Nall, Clerk.)

(*Trial, Verdict, and Judgment, May* 29, 1918.)

4593.

BENJAMIN GRATZ, Plaintiff,

vs.

McKEE AND BLIVEN BUTTON COMPANY, J. S. McKEE, and NELLIE Canon Bliven, Executrix of W. E. Bliven, Deceased, Defendants.

Now at this day come again the parties hereto by their respective attorneys, and comes also the jury impaneled and sworn upon the trial of this cause as on yesterday; and now the said plaintiff amends, by interlineation, his amended petition in this cause by inserting in the last line on page 1, after the word, "owned" the following words, "and was in possession of;" and by inserting in the 5th line of paragraph 3, page 2, the following words, "and was in possession of" (after the word "owned")

25 And now the said plaintiff further files and presents to the Court a motion for judgment in this cause and the said defendants now demurring to the evidence and moving the Court for a peremptory instruction to the jury to return a verdict in favor of the said defendants, the said motion for peremptory instruction is by the Court sustained and the said instruction given; to which ruling of the Court the said plaintiff excepts.

And now the said jury returns into Court its verdict in words and figures as follows, to wit:

"#4593.

BENJAMIN GRATZ, Plaintiff,

vs.

McKEE AND BLIVEN BUTTON CO. et al.

Verdict.

By direction of the Court, we the Jury *of* the above-entitled cause, find the issues herein joined in favor of the said defendants.

May 29th, 1918.
(Signed) THEODORE W. KISKER,
Foreman.

It is, therefore, now considered and adjudged by the Court that the said plaintiff take nothing by his suit in this behalf and that the said defendants go hence without day and recover of the said plaintiff their costs and charges herein expensed; for all of which let execution issue.

And now the said plaintiff files a motion for a new trial in this cause.

May 29th, 1918.

JOHN C. POLLOCK,
Judge.

(Order of May 30th, 1918, Overruling Motion for New Trial and Extending Time for Bill of Exceptions.)

Now at this day comes the said plaintiff by attorney and by leave of Court amends by interlineation his motion for a new trial in this cause by adding thereto three additional grounds numbered 10th, 11th, and 12th. And now the said motion for a new trial is submitted to the Court and the Court being fully advised in the premises, doth

Order that the said motion be overruled, to which ruling the said plaintiff excepts.

On application of said plaintiff, it is further Ordered that he be allowed until September 16th, 1918, to present a bill of ex-
26 ceptions in this cause and that the issuance of execution under the judgment herein be stayed until said date.

May 30th, 1918.

JOHN C. POLLOCK,
Judge.

(Order Extending Time for Bill of Exceptions.)

Upon motion of counsel for plaintiff, upon good cause shown, it is ordered by the Court that the time for presentation, authentication and filing of the bill of exceptions in the above entitled cause be and the same is hereby extended for thirty days from and after September 16, 1918.

(Signed) JACOB TRIEBER,
District Judge of the United States,
Presiding in said Court.

O. K.
JONES, HOCKER, SULLIVAN & ANGERT,
Of Counsel for Defendants.

(Endorsed: Filed Sep. 10, 1918, W. W. Nall, Clerk.)

(Record Entry of the Filing of Bill of Exceptions.)

Now at this day comes the said plaintiff by attorneys, and files his bill of exceptions in this cause, the said bill of exceptions bearing an order of allowance by the Honorable John C. Pollock, District Judge.

September 19th, 1918.

DAVID P. DYER,
Judge.

Bill of Exceptions.

Be it remembered that upon the trial of said cause, during the March Term, A. D. 1918, of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, on the 27th, 28th and 29th days of May, 1918, before the Honorable John C. Pollock and a jury, the following proceedings were had:

Appearances:

Barclay & Wallace, for Plaintiff;
Jones, Hocker, Sullivan & Angert, by Messrs. Lon O. Hocker and George F. Haid, and Hoffman & Hoffman by Mr. William Hoffman, for Defendants.

A jury was impaneled and sworn, and the Court admonished the jurors as to their proper conduct during the trial of said cause.

27 The Court sustained plaintiff's motion to strike out parts of the amended answer, to which ruling of the Court the defendants, by their counsel, then and there, at the time, duly excepted, and said exception was allowed.

The Court overruled defendants' motion requiring plaintiff to elect, to which action of the Court the defendants, by their counsel, then and there, at the time, duly excepted, and said exception was allowed.

The plaintiff, by counsel, hereupon called for the production of certain correspondence between defendants and Mr. Blake, and the other papers, specified in the order heretofore made in this cause; to which counsel for defendants responded that defendants were unable to produce said correspondence and would show what disposition had been made of same, and supply an explanation. Whereupon this matter was deferred to a later stage of the trial.

BENJAMIN GRATZ, a witness of lawful age, being duly sworn and examined, testified, in substance, on behalf of the plaintiff, as follows:

Direct examination.

By Mr. Wallace:

I am the plaintiff in this case; for forty years I have been and am now a citizen and resident of Missouri, and live in the City of St. Louis. The lands referred to in this case were purchased by four or five people of whom I am one, about fifteen years ago. These owners all live in St. Louis; and, in order to handle the lands without forming a corporation and in order to keep out of the Probate Court in case any of us died, the property was deeded to the St. Louis Union Trust Company of which I am a director. The lands never did belong to the Trust Company.

I own a great deal of land in various parts of the country; a good many farms.

I have none of the original title papers, concerning the lands referred to in this case, under my control or in my possession.

Mr. Wallace: I desire to introduce in evidence at this point two plats, under the seal of the General Land Office at Washington, as "Plaintiff's Exhibit No. 1" and "Plaintiff's Exhibit No. 2."

(These exhibits are photo-lithographic plats of Township 20, North, Range 11 and of Township 20, North, Range 12, East
28 of the 5th Principal Meridian, in Pemiscot County, Missouri, showing certain swamp lands, including the lands described in the amended petition, within all of which is the channel of the stream called Little River; but said channel is not marked or shown thereon. Said lands extend from a northeasterly to a southwesterly direction through said county. In each quarter-section of all of said lands there appear the survey lot number and the number of acres of land surveyed and contained in each lot; and all of said lands are so numbered by lots and surveyed.

The surveys appear to have been made by the General Government in September, 1875, and are stated to be "additional surveys," in said Townships. Each exhibit is certified by an Acting Assistant Commissioner of the United States General Land Office, Department of the Interior, and bears the official Seal of that office.)

Mr. Wallace: I now offer in evidence as "Plaintiff's Exhibit No. 3" a certified copy——

Mr. Hocker: Pardon me. This copy (Exhibit 2 and 3, above) is not self-explanatory. It may become competent or not. I do not think it is competent at this stage without some explanation of it.

Mr. Wallace: It speaks for itself.

Mr. Hocker: It does not speak plainly. I do not understand it.

The Court: It may be explained; if not, of course it will be excluded.

Mr. Wallace: I offer as "Plaintiff's Exhibit No. 3" a certification from the Springfield Land Office, under the hand and seal of the registrar of that office, showing the selection as swamp or over-flowed lands, of the lands described in the petition in this case.

Mr. Hoffman: We wish to interpose an objection to that as incompetent, immaterial, and not properly certified.

The exhibit last referred to was marked as requested, and is in the words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT No. 3.

(This exhibit, under the hand and seal of the Register of the United States Land Office at Springfield, Missouri purports to be a copy from the Tract Book on file in that office, showing the entry
29 of certain swamp land selections, comprising the lands described in the amended petition.)

Mr. Wallace: I also offer a certified copy of a swamp land patent from the State of Missouri to Pemiscot County, which we ask to be marked "Plaintiff's Exhibit No. 4."

Mr. Hoffman: We make the same objection to that.

The paper last referred to was marked as requested and is in the words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT No. 4.

(This exhibit is a certified copy of a patent from the State of Missouri to Pemiscot County, conveying a portion of the lands described in the amended petition in this case, together with other lands in said county. Said patent recites that said lands were granted to the State of Missouri by the Act of Congress, approved September 28, 1850, relating to swamp lands official plats of surveys of which have been returned to the General Land Office by the Surveyor General.)

Mr. Wallace: We offer another patent from the State of Missouri to the County of Pemiscot, which we ask to be marked "Plaintiff's Exhibit No. 5."

Mr. Hoffman: That is objected to as incompetent, irrelevant and immaterial, and it does not show the land in question.

The Court: I suppose it is a mere chain of title.

Mr. Wallace: Chain of title, that is all, your Honor.

The Court: Proceed.

The paper last referred to was marked as requested and is in the words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT No. 5.

(This exhibit is a certified copy of another patent from said State to said County, conveying the remainder of the lands described in said amended petition, together with other lands located in said County. Said patent also recites that said lands were granted to the State of Missouri by the Act of Congress, approved Sept. 28, 1850 relating to swamp lands official plats of surveys of which have been returned to the General Land Office by the Surveyor General.)

30 Mr. Wallace: Also a certified copy of patent or deed from the County of Pemiscot to the St. Louis Union Trust Company, which we ask to be marked "Plaintiff's Exhibit No. 6."

Mr. Hoffman: We make the same objection

The paper last referred to was marked as requested and is in the words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT No. 6.

(This is a certified copy of a patent dated Nov 9, 1903, from Pemiscot County to St. Louis Union Trust Company, conveying the lands described in said amended petition, as owned by said Trust Company, together with other lands in said county.)

Mr. Wallace: We also offer a certified copy of a similiar patent or deed from Pemiscot County to the Himmelberger-Luce Land & Lumber Company, which we ask to be marked "Plaintiff's Exhibit No. 7."
Mr. Hoffman: We interpose the same objection.

The paper last referred to was marked as requested and is in the words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT No. 7.

(This is a certified copy of a document purporting to be a patent from Pemiscot County to Himmelberger-Luce Land and Lumber Company, dated May 8, 1900, but not acknowledged, conveying the land "between the meanders of Little River, in the west half of section No. 25 in Township No. 20 of Range No. 11 East" and being about 125 acres.)

Mr. Wallace: Likewise a certified copy of a deed from Himmelberger-Luce Land & Lumber Company to the Himmelberger-Harrison Lumber Company, to be marked "Plaintiff's Exhibit No. 8."
Mr. Hoffman: We make the same objection to that exhibit.
The Court: The objection is overruled.

To which ruling of the Court the defendants, by their counsel, then and there, at the time, duly excepted, and their exception was allowed.

31 The paper last referred to was marked as requested and is in the words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT No. 8.

(This is a certified copy of a quit claim deed from Himmelberger-Luce Land and Lumber Company to Himmelberger-Harrison Lumber Company, dated July 13, 1903, conveying the land mentioned in Plaintiff's Exhibit No. 7.)

Mr. Wallace: As "Plaintiff's Exhibits No. 9 and No. 10," respectively, we offer in evidence the assignments from the St. Louis Union Trust Company and from Himmelberger-Harrison Lumber Company to Mr. Gratz, the plaintiff, of the causes of action mentioned, and ask that they be marked accordingly.
Mr. Hoffman: The same objection is made to those.
The Court: Objection overruled.

To which ruling of the Court the defendants, by their counsel, then and there, at the time, duly excepted, and their exception was allowed.

The papers last referred to were marked as requested and are in the words and figures as follows, to-wit:

PLAINTIFF'S EXHIBITS No. 9 AND No. 10.

(These exhibits are assignments of the asserted causes of action and are dated August 6, 1914, which set over, assign and transfer t plaintiff "all right or cause of action that has accrued or that ma thereafter accrue during the year 1914.")

The Witness: I know the signatures of John F. Shepley, Vice President of the Trust Company, and of Mr. Himmelberger, President of the Lumber Comp-ny, which said assignments bear.

Mr. Wallace:

Q. Did you or your assignors, the Lumber and Trust Companies ever consent to the taking of the shells specified in the petition, b anyone, particularly by McKee & Bliven Button Company?

Mr. Hocker: I object to that. That calls for a legal conclusion.
The Court: He may answer as far as he is concerned.

32 A. As far as I know they never consented to it.

Mr. Wallace:

Q. Did you ever?
A. Never.

Cross-examination.

By Mr. Hocker:

Q. What do you use these lands for, Mr. Gratz?
A. They are now farms.
Q. How much of them?
A. Nearly all of them. There are large products of corn.
Q. How long since they have been used?
A. Last year.
Q. Since the Little River Drainage District was established?
A. Yes, sir.
Q. Before that they were not used for farms?
A. Before that they were swamps.
Q. When was that ditch completed?
A. Those ditches?
[A.] Yes; the Little River drainage ditch.
A. I don't think they are all completed yet, but it has been going on for four or five years.
Q. Do you know how much of the land is under cultivation?
A. I cannot tell you that definitely, but of those lands that we own down there, there were some three thousand acres in corn last year.
Q. How many acres are there in what you own?
A. About fourteen thousand acres.
Q. How much did the other Company own?
A. The Himmelberger Co.?

COPY BOUND

Q. Yes.

A. Well, they own a very much larger body of land, but only one hundred and twenty-five acres is involved in this.

F. C. FREIBURG a witness of lawful age, being duly sworn and examined, testified, in substance, on behalf of the plaintiff as follows:

Direct examination.

By Mr. Wallace:

I am freight accountant for the Frisco Railroad Company, the successor to the St. Louis & San Francisco Railroad Company. I am in charge of certain records and documents, including way-bills: and I have here the way-bills covering nine cars of mussel shells. This railroad has a branch at Pascola and at Wardell, in Pemiscot County, Missouri, and served both places in 1913 and 1914. These nine way-bills are originals, and cover shipments made from Wardell (but billed from Pascola) and consigned to McKee & Bliven Button Company, Muscatine, Iowa; eight cars in 1913 and one car in 1914.

(Hereupon it was agreed that the following statement of the contents of said way-bills might be read in evidence; and the same follows as:)

CLOSE IN CENTER

PLAINTIFF'S EXHIBIT No. 11.

Statement of Mussel Shells Forwarded from Pascola, Mo., Account of Wardell, Mo.

Date.	W/B.	Int.	Car number.	Billed to—	Weight.	Consignor.	Consignee.	Destination.
1913								
7/22	241	SF	121,843	St Louis, Mo.	56,500	Blake & Cheek	McK. & B. B. Co.	Muscatine
8/16	54	SLNE	13996	" " "	82,300	Blake	McK. & B. B. Co.	"
8/14	137	SF	124,595	" " "	88,000	Blake	McK. & B. B. Co.	"
8/21	189	B&O	97255	" " "	62,000	Blake	McK. & B. B. Co.	"
8/27	263	CNW	116,740	" " "	89,000	"	" "	"
9/5	84	M&O	19418	" " "	64,000	"	" "	"
9/18	186	IRC	17762	" " "	55,000	"	" "	"
10/1	5	SF	27814	" " "	52,700	"	" "	"
1914								
8/4	34	SF	36675	" " "	64,600	Blake	Wm. A. Blake	"

The plaintiff then read in evidence the deposition of BRUCE C. HIGHTOWER whose testimony, in substance, is as follows:

I live in Muscatine, Iowa, and am Auditor there of the Muscatine, Burlington & Southern Railway, which is a successor to the Muscatine, North & South Railway. I have charge of the waybills and receipts and other papers which relate to shipments over this road.

34 (Hereupon the witness identified certain expense bills and way-bills, and produced certain receipts given by McKee & Bliven Button Company, covering and for the eight cars of shells shipped in 1913 (as shown by the foregoing schedule) showing delivery of said cars to said Button Company; which expense bills, and way-bills and receipts were offered in evidence by the plaintiff.)

J. E. MCCLUNG a witness of lawful age, being duly sworn and examined, testified, in substance, on behalf of the plaintiff as follows:

Direct examination.

By Mr. Wallace:

I reside in Muscatine, Iowa. I am a shell buyer and jobber; dealer in shells. I have had seventeen years' experience in the shell business; principally buying and selling shells, and manufacturing buttons out of shells, in Muscatine. I have obtained shells from the land referred to in the case; and there was a suit by Mr. Gratz against me for so doing. I have been to Wardell in Pemiscot County, Missouri; the first time was in 1913 when I was there for a couple of weeks. I think that was in July in 1913; and I was there several times, off and on thereafter, during that year. I was there in 1914. I know the Little River there where I own some land. Wardell is a real small place of, I would judge, fifty or seventy-five inhabitants, probably, as near as I could see. In 1913 and 1914, to get to Wardell by railroad you had to go through Pascola.

Mr. Wallace:

Q. Mr. McClung, you say you own land down there?
A. Yes, sir.
Q. Where is that land; can you tell where it is, by the section numbers?
A. Yes; section twenty-five.
Q. What range?
A. South of Wardell.
Q. That is range eleven?
A. Wardell itself is in section twenty-five, right north of the center, south of section twenty-five. This land is right south of section twenty-five.
Q. That is where you own some land?
A. Yes, sir.
Q. Please locate accurately and definitely the exact location of this village of Wardell.

A. Wardell is directly north of the river, and right directly north of the center of section twenty-five.

Q. Range eleven?

A. Yes, sir.

Q. Have you seen this map (indicating)?

A. Yes, sir.

35 Q. Is that the approximate location of Wardell?

A. Approximately.

Q. Do you know where Wardell is located with reference to the lands of the Lumber Company we have been mentioning here?

A. I think Wardell is right directly north of that land, because this is right north of the river.

Q. Do you know where those lands are?

A. Yes; is right south of Wardell, those lands.

Q. From what you have stated, you mean north of Wardell, do you not?

A. I think it goes north and south, both, of Wardell. That is my recollection.

Q. Anyhow, they are right there at Wardell?

A. Yes, sir.

Q. Is the railroad in the town of Wardell?

A. Yes; it is right in the town of Wardell.

Q. Do you know how such shells as were shipped out of there to you, or to other persons, in 1913 and 1914 were loaded?

A. They were shipped over to Pascola and billed out, because there was no agency in Wardell.

Q. I understand, but I mean where were the shells loaded in the cars, what spot?

A. On the side-track at Wardell.

Q. Would the car be north of the river or south of it?

A. It would be north of the river.

Q. How far would a car be moved after it crossed the river before coming to the place where the shells were loaded?

A. Oh, I should judge about a block.

Q. How many feet or yards?

A. I believe a block is 1,600 feet; something like that.

Q. Would that be your judgment of the distance from the river to the place where the cars were set for being loaded?

A. About that, yes; about that. When I went down into that country I went to investigate the quality and quantity of shells that were in the Little River, and to make arrangements to have them taken; and I should judge I got over three hundred and fifty tons of these shells. While there I investigated the shell field on either side of Wardell for a short distance; it is always customary to take them as close as possible to start on, to save hauling and freight charges. For about three quarters of a mile on either side of Wardell I became acquainted with the swamp or river. The shells I obtained there were loaded in the cars on the sidetrack right north of

36 town. Wardell is where the shells were loaded in the cars, and they were billed out of Pascola. I found a great many shells for the size of that stream. These were a very good cheap

shell; they were a low grade shell, a very good low grade shell. Such shells were capable of being used for making pearl buttons. There are many different ways of digging and gathering shells. At Wardell they were taken principally with tongs, a kind of what they call an oyster fork. It has a handle and they go together like that (illustrating) and they raise them up. The water there was most favorable for using tongs. During the real low stages they waded and got them out. I would say that the principal part of them were taken with tongs. The shells can be taken with tongs very nicely in anything up to about twelve feet of water. In 1913 and 1914 Little River was very crooked; a very crooked stream; lots of deep short bends in it, and there was quite a variation in the depth. Some places were considerably deeper than others, and they would be right close together, too. It seemed to run off in holes. It was a very swampy stream; that is, it ran out flat, and there was growth in the stream, trees. In certain places this swampy condition existed on either side of the channel. Some places the banks were high, but principally on both sides, more or less.

After the mussels were dug, they were boiled out by the diggers, on the banks of the river, generally, where they are taken, or very close. The meat was taken out of the shells and they were prepared for market. The shells were then taken to the cars and loaded and shipped. The diggers aimed to get the shells shipped as soon as they could get a carload together; as fast as they could get them together. Under ordinary conditions during the summer and working season, I don't think the shells would be on the bank over two or three weeks. From the place where the shells were piled on the banks, they were hauled to the car in wagons, principally; altogether, I think. The diggers would get somebody, or the men that we had would get somebody to load them.

I know Mr. W. A. Blake. I saw him in Wardell during 1913 and 1914 on my trips there. That is his place of residence, I believe. I really don't know his business; he had none that I know of. I think he was not a man of means.

I know Mr. James Figg. I think he is McKee's shell man. That is what I always called him. I don't know what his title is. I have not seen Mr. Figg down in Wardell. I had a conversation with Mr.
McKee, the defendant, concerning Mr. Figg, in the factory
37 one time at Muscatine.

I then had more shells than I cared to carry in stock and I went down to see Mr. McKee about selling him some shells, and Mr. McKee stated that he was pretty well fixed on those particular shells at that time, and said he had a man there, and asked me if I knew anything about him, and I said I didn't. That man was Mr. Blake; Mr. McKee called his name. Mr. McKee said that he had a man at Wardell; this was along about July, 1913. I do not know whether Mr. Blake is in the employ of the McKee & Bliven Button Company, or Mr. McKee, at this time; nor do I know whether he has been so employed at any time within the last two years.

The shells I got from the Little River country, or Wardell, were sold by me, principally in Muscatine, Iowa.

Mr. Wallace:

Q. Mr. McClung, such shells as were loaded at Wardell came from what locality, from what place?

Mr. Hocker: I object to that unless the witness knows and shows that he knows.

Mr. Wallace: I think he is competent to answer that question.

Mr. Hocker: He cannot answer generally.

The Court:

Q. Do you know anything about these shells, this----

A. Yes, I know something about them.

Q. Do you know where they were loaded?

A. Yes, I know where they were loaded.

Mr. Hocker: May I cross-examine?

Q. Were you down there when any of them were loaded?

A. Yes, sir.

Q. How many cars did you see loaded?

A. I can't say exactly; possibly two or three cars.

Q. You saw those two or three cars loaded at Wardell?

A. Yes, sir.

Mr. Wallace:

Q. Where did these shells come from?

Mr. Hocker: That is objected to. The witness has not shown that he saw——

Mr. Wallace: As I understand you, you know Mr. Blake?

A. Yes, sir.

Q. You saw him in the shell business down at Wardell?

A. Yes, sir.

38 Q. And you saw certain cars of Mr. Blake's loaded?

A. Yes; they were taken at the very same place that ours were.

Mr. Hocker: I move that be stricken out. The witness has not shown any knowledge——

The Court (to Mr. Wallace): Ask him if he knows where they were gathered.

Mr. Wallace:

Q. Do you know where they were gathered?

A. I know where some of them were gathered. I don't know every one.

Mr. Hocker:

Q. You mean that you saw them gathered?

A. I saw his men taking them from the same place, off the same beds that my men were gathering the shells, yes.

The Court: Very well.

Mr. Wallace:

Q. Where were those places?
A. Probably about a half mile north of Wardell station.
Q. On the lands we mentioned here in this case?
A. Yes, sir.
Q. Any on the other side of Wardell?
A. I don't know as I saw them taken in particular south of Wardell.
Q. In other words, if I understand you, you mean on the so-called Little River?
A. Yes; the ones I saw were taken off the same beds that my party were taking them, about a half mile north of Wardell station.
Q. Do you know who owned those lands at that time?
A. Yes; I know who owns the adjoining place.
Q. I mean the lands from which shells would come.
A. The swamp land was owned by the Union Trust Company, and right directly north of Mr. Perigon's place.
Q. Was that swamp?
A. No, sir.
Q. I am not referring to anything but the swamp lands. Explain what you saw concerning the working of Mr. Blake and his men down there.
A. They were loading some shells when I was down there and taking practically from the same places that we were taking ours from. They were boiling them out at practically the same place and loading them and hauling them to the station.
39 Q. How many men did Blake have working for him?
A. I couldn't say that; probably three or four right in that particular place they were digging.
Q. Were these men the natives——
A. Yes, sir.
Q. —the diggers down there?
A. Yes, sir.
Q. When you went in there to get your shells did you make any inquiry concerning the ownership of the lands from which the shells came?
A. No, sir. We always go and take the shells; as long as nobody says anything we take the shells. I did so in that case. Nobody said anything at the time, and we took the shells.
Q. With reference to the Little River at it existed at that time: What, if any, use did you see being made of that Little River other than in musseling?
A. They were dredging down at the lower end of the river; hauled coal from the bridges down to the dredges in boats. That is all the use I saw made of it.
Q. You are speaking of dredging: Dredging what?

A. Making the channel deeper, and straightening.

Q. That was the drainage improvement referred to down there?

A. Yes, sir.

Q. I mean, was there any commercial use or personal use, that is, for transportation of anything—people or property, of that river other than in this dredging?

A. No, sir; the trestle was clear across. You could not get a skiff through the trestle itself.

Q. You mean the railroad trestle?

A. Yes, sir.

Q. Was the river deep enough for any kind of a boat?

A. At times it would have been deep enough if the bridges would have permitted navigation, but that was only during the extreme high water.

Q. What sort of a boat in such case can navigate Little River; how large a boat?

A. A very small one.

Q. You mean a skiff or a dugout?

A. Oh, possibly in extreme high water, if it was not for the bridges being there, possibly a boat going two feet could come up there.

Q. Mr. McClung, during your experience in the shell business, if I understand your previous answers, you have bought and sold many shells of different varieties and kinds?

A. Yes, sir.

Q. From what states, generally, would those shells come?

A. They came from about two-thirds of the entire states of the United States.

Q. Including Missouri?

A. Yes, sir.

40 Q. Do you know the fair market value of such shells as the Little River shells?

A. I think I do.

Q. Please state what such value of those shells was in the city of Muscatine, Iowa, where you live, in the year 1913.

Mr. Hocker: I object to that as not being a proper measure of damages—Muscatine, Iowa.

Mr. Wallace: It is simply an element in the proof.

The Court: The objection is sustained. This is an action for injury to the realty. It is brought by the assignee of the owner of the land. So the measure of damages for the taking off the land is the value of the property taken in place of the land.

(Here ensued colloquy between Court and counsel.)

The Court: I am going to exclude it.

Mr. Barclay: We offer to show the value of this property, that is to say, these shells which were taken by the defendants from the property of the plaintiff, at Muscatine, Iowa: the value is to be proven as to Muscatine, both in the first and unmanufactured state, and we make the second offer of the same kind as to the manufacture- goods.

Mr. Hocker: I make the same objection.
The Court: I cannot let you put that in.

To which ruling of the Court the plaintiff, by his counsel, then and there, at the time, duly excepted and said exception was allowed.

Mr. Wallace:

Q. During the years 1912 and 1914 what was the value per ton of the Little River shells, at Wardell, Missouri?

Mr. Hocker: That is objected to unless it is shown to be in the river as they were at the time.
The Court: I told them I would allow them to show it at Wardell.

Mr. Wallace:

Q. In the car, at Wardell?
A. About $13.50.
Q. About $13.50 per ton?
A. Yes, sir.
Q. What in your judgment was the value of those shells during those times, as they were in Little River?
The Court (to the witness): Per ton.
A. As they were in Little River?

41 Mr. Wallace:

Q. Yes; as they were before they were gathered.

The Court: You had better give the witness an idea of the time they were gathered.

By Mr. Wallace:

Q. During 1913 and 1914.
A. As they lay in the river bottom before they were taken?
Q. Yes; how much per ton, in your judgment, was their value?
A. Well, I believe about three dollars per ton.

Mr. Wallace: We are anxious that the record should be just as we would like to have it, if it is possible, and I would like to reframe my first question, if I may, to get it properly in.
The Court: Very well.

Mr. Wallace:

Q. Please state the reasonable market value of the Little River shells, such as we have been talking about, in the city of Muscatine, Iowa, during the years 1913 and 1914.

Mr. Hocker: I make the same objection as before.
Mr. Hoffman: And that it is incompetent, irrelevant and immaterial, and not the proper measure of damages.
The Court: Objection sustained.

To which ruling of the Court the plaintiff, by his counsel, then and there, at the time, duly excepted, and said exception was allowed.

By Mr. Wallace:

Q. Mr. McClung, certain depositions here appear to show that you sold certain Little River shells to parties at Muscatine, by the names of Jake Lemkau, John Butler and Henry Umlandt: Is that a fact?

A. Yes, sir.

Q. Were these parties I have mentioned present at the trial of this case in Davenport, Iowa?

A. Yes, sir.

Q. Do you know whether they saw and examined the Little River shell during that trial?

A. Yes, they did.

Mr. Wallace: I may state that that is for the purpose of qualifying a deposition.

Cross-examination.

By Mr. Hocker:

I am a shell buyer or shell broker; that is to say, I buy shells and sell them again to manufacturers. I bought approximately three hundred and fifty tons of shells down in this Little
42 River country on this land we have mentioned; and sold them. I bought principally from diggers who dug them themselves; I had a man that I bought them from principally. He paid the diggers and collected that of me. I paid him eleven dollars a ton, I think. I couldn't say exactly what he paid the diggers; but he should have made about two dollars a ton. The man that handles them down there should make about two dollars a ton. That is around the customary amount that they expect to make. I paid eleven dollars for the principal part of them. I paid some variation—I paid as high as thirteen dollars. The lowest was about eleven dollars, and that was the greater part of them. These shells were principally what we call a three-ridge shell which is not the best shell for buttons by a good deal.

I have been down there off and on ever since 1913. In 1913 I was there something like two weeks at that time.

The conversation I had with Mr. McKee was after I came back. I then knew what Blake was doing down there; but not from Mr. McKee. Blake was then taking a part of these shells from the same place where I was; that is, above Wardell, about a half or three-quarters of a mile. I believe there were about five men, or such a matter, at work there then, but not all in one place. I can't say definitely how many cars I saw loaded—something like two or three. The rest of these, the other six or seven, I didn't see loaded, and don't know anything about them, nor where the shells came from. I believe it was in August, 1913, when I saw one of these cars.

I was sued by Mr. Gratz, up in Davenport, for those three hundred and fifty tons I got; and that suit was dismissed. It never was tried. I did not agree, in consideration of that suit being dismissed, to render Mr. Gratz any assistance that I could in this case as a witness or otherwise. I told Mr. Gratz that I didn't have any money and he wouldn't get anything out of me, anyhow, and he just dismissed the suit. I think it was 1914 when that suit was dismissed. I am not sure whether it was the same year or the year before, that the suit was filed.

I then made an agreement with Mr. Gratz to give him half of the net profits from the shells and thereafter I obtained more shells under that condition. I think I paid him about a hundred and fifty dollars on a hundred and fifty tons, or about a dollar per ton.

Warren was the keeper of this land and looked after it. I saw him several times down there when I was getting shells; and
43 he saw me. I can't say that he saw the men who worked for Blake, but I presume he was around the same place where I was and where these men were. All the digging was done in daylight where everybody who happened to be there could see what was being done. Possibly Warren saw what I did; I presume that he did. I can't say as to whether Mr. Warren knew what I did or not, but what I was doing was a matter of common knowledge, and nobody objected. I went ahead and took out what I wanted, and so did Mr. Blake, or his men, and we thought it was the end of it, but we found out it was not. I think that most of the men who were doing that work made their living there fishing and hunting and gathering claims or mussels. I don't remember whether Warren or his son hauled any of my shells. I sent H. C. Rehbehn of Muscatine down there to work for me in getting the shells I obtained. He went before I did, and was there when I was.

I know where my land down there is and I know where other places are; but I never made any surveys there. My place is directly south of Wardell, but is not on the river. It is not swamp land. I bought it about three years ago.

Redirect examination.

By Mr. Wallace:

The suit against me for the shells I got may have been dismissed in 1915. I may have been mistaken in giving 1914 as the year. I told Mr. Gratz, or showed him that he could not make any money out of me, and that I would be willing to handle the rest of the shells, and therefore he dismissed that suit. I made that arrangement with the attorneys for Mr. Gratz, not with him personally.

The shells shipped under this understanding with Mr. Gratz were sold in 1915, and I think the market was about the same then as it was in 1913 or 1914.

There are several different varieties of mussel or fresh water clam, as they are called. They live at the bottom of the rivers. They are

the same family as the oyster is in salt water, but their habits are a great deal different. Fresh water mussel or clam means that the locomotion is very limited, especially the variety you find in the Little River, the three-ridge. They don't move a great deal. We know this by the fact that when the water falls suddenly at any time they become stranded and die on the bank because they are not able to move fast enough to get in the water; they start to fall. There is a great deal of variation of mussel size; in the different rivers are different sizes. The variety most prominent in the Little
44 River is the three-ridge. I should judge that they run up as high as five inches in length, and possibly two and a half inches in width. The approximate contour or shape of such a shell is about like one's hand; some of them are smaller and some of them are that large.

They move, enabled by attaching that underneath part of the body to the dirt; it kind of takes hold like that (illustrating) and moves the shell, in a jerky fashion. Some varieties move a great deal more than others, but the variety found in Pemiscot County, in the Little River in Pemiscot County, are the three-ridge, and move very little. I wouldn't think that it would be possible for them to move more than a foot a day at the most. They are not always on the move. They don't move a great deal. They generally stay—it seems they stay where they are raised. They are found in beds and until they are taken out they seem to be there. They are found together and we call them shell beds, just the same as an oyster bed. They are not piled on top of each other, but they lie very closely together in the bottom of the river. They are partly in the mud; they are submerged partly in the mud. I have heard it said that the mussels in the slough are an entirely different variety from these we are talking about. I have heard it said that some mussels can float, but I have never seen them in my experience. There is some distinction between mussels such as are in Pemiscot County, and those in other places; with respect to locomotion, there are some mussel shells that move a great deal more than others, as I said before; the sand shell variety of mussels moves considerably; only about one per cent of the mussels in Pemiscot County is of the sand shell variety. The three-ridge shell comprised the largest percentage of Pemiscot County mussels. By "three-ridge" shell we mean those that have three ridges on the outside of the shell.

Recross-examination.

By Mr. Hocker:

There are some other varieties, beside the three-ridge, in Little River: pig toe, deer horn, pocket book; I believe that is all I can think of. In propagating, the young mussel attaches itself to the fish; the gills of the fish; and follows the fish as it wanders around, and at certain stages of development it drops off. It is a parasite while it is on the fish and gets its substance from the body of the fish. And when it reaches a certain stage of development it drops out in the water.

Redirect examination.

By Mr. Wallace:

It is only a parasite while it is on the fish.

45 A shell is comprised principally of lime; about ninety-five per cent lime.

M. O. HICKERSON, a witness of lawful age, being sworn and examined, testified in substance, on behalf of the plaintiff as follows:

Direct examination.

By Mr. Wallace:

I live at Wardell, Missouri, and am Justice of the Peace of Little River Township. I have lived at Wardell all of my life; thirty-seven years.

I have dug shells down there for different parties. Wardell is in Little River Township, on the northern part of the County; something near two and a half miles of New Madrid County. Wardell is located in section twenty-five, range eleven. I can locate Wardell on the Government map showing the sections.

By Mr. Wallace:

Q. In what part of section twenty-five, or at what place therein, is the village of Wardell located?

A. (Indicating.) It is located right on the bank of Little River, where the section line connects into the river.

Q. What do you mean by "where the section line connects?

A. The section line of twenty-five. It is a half mile west of the range line of 11-12.

Q. Then you mean the point where the quarter section lines intersect?

A. Yes, sir.

Q. In section twenty-five?

A. Yes, sir.

Q. In 1913 and 1914 where was the channel of the Little River; where did the channel of that Little River touch that intersecting point, if you know?

A. In 1913 and 1914 the channel of Little River at Wardell?

Q. Yes.

A. It has not been changed.

Q. That part has not been changed?

A. No, sir.

Q. Then where is Wardell located with reference to the channel of Little River?

A. Right on the bank of Little River.

Q. Of which bank, north or south?

A. On the north bank.

Q. On the north bank?

A. Yes, sir.

Q. How far from the north bank is Wardell located?

A. Well, right on the bank.

46 Q. How does the railroad get over that river, is there a trestle or bridge there?

A. Trestle.

Q. After a car on the railroad crosses the trestle how far does it go into Wardell before it reaches the place where mussel shells have been loaded?

A. Well, when the cars are set in there they are switched. It comes right into the little village of Wardell; they set on that switch right on the bank of the river.

Q. That switch is in Wardell?

A. Yes, sir.

Q. I want to ask you if you know whether the channel of Little River is within the limits or boundaries of the swamp land down there, shown on this Government map (indicating).

A. Yes, sir.

Q. It is?

A. Yes, sir. I should think there are something near one hundred inhabitants, at present, in Wardell; their business is farming and public work; timber work, farming. There is some hunting and fishing done. Wardell is not now an incorporated town; it ceased to be in 1912 because the town couldn't keep up the expense of the office. The town is in what is known as the Little River Township. In 1913 and 1914 I was engaged in the musseling business. I dug shells and sold shells from the Little River at Wardell. I dug shells in that river, up and down from Wardell, for from a quarter to one and a half either way. The way that I dug shells was to go out in the water and pick them up by hand, with my fingers. I could not see them; I had to feel for them; the water was muddy. A part of them would be almost buried in the mud. I have been acquainted with the mussel down there all my life. In digging shells down there, other people used forks, something like a potato fork, that had eight or nine prongs to it. They would fork them that way. And the other way they had tongs, something like those tongs used in digging up snails. They would fork them in deep water when they couldn't reach them any other way. During those years there were quite a lot of us digging shells. They were all from Wardell and around there, except those people that were in there engaged in buying shells. There were some men in there that were engaged in buying shells. I dug for a man by the name of Blake, and Chee, and also a man named Rehbehn. The Blake I have referred to is William A. Blake mentioned in this case. I don't know the amount of shells I dug for Blake. I sold shells to him.

I don't know how much the mussel down there moves about; they move, but they move so slow I never did see the movement of them by my eye at all. All I can tell they move; you can see the

47 train in the mud, but how long it takes them to move, we can't tell, because I never did see them move. I have lived there all my life. I never paid particular attention to them about

the movement of them at all, but I knowed of them all my life. I have never seen one in motion; but I have seen a trail in the mud. You will find the mussels pretty well bunched; we call them beds of shells. When we are digging we find a bed of shells. After shells are dug they are put in a vat and boiled until they come open, and they are taken out and throwed out on the bank, and later on they are hauled and moved in cars. The meat is throwed out to the hogs; and the shells are throwed out on the bank, where they are piled right at the edge of the river. It would depend on how long it would be before they are hauling from that place as to how large a pile would be made there. The length of time a pile remained on the bank before being hauled would depend on getting cars; sometimes from ten days to a month. Then they were hauled to Wardell. All shells so taken were hauled to Wardell. I know that Mr. Blake did make shipments from Wardell. The shells that he shipped from Wardell came out of Little River, up and down from Wardell. I know of my own knowledge about every car that Mr. Blake shipped out of there during 1913 and 1914; all of the shells, except one car, came from the places I have just referred to. He went down the river somewhere by Honersville, probably, and got some shells, and he shipped a half carload back to Wardell and finished loading this car at Wardell. This half car was obtained in another County down below and was then shipped into Wardell and filled by Mr. Blake with shells taken there at Wardell.

I have known Mr. Blake something near fourteen or fifteen years. During 1913 and 1914 I was acquainted with his financial condition. He didn't have any means, only just a laboring man, a day laborer. Several of us worked for him in digging shells; I couldn't tell how many. He would pay us with the money; when the shells were brought in he would pay so much for a box. Mr. Blake never employed me to dig for him; only just paid me for the amount of shells that I would give him. Mr. Blake did some digging himself during those years. I couldn't say how much he paid me for the shells I delivered to him; but he paid me twenty cents a box, and they claimed a box would weigh a hundred pounds gross, that is, just as the shells were dug out of the river. In such a case he would do the cooking. He paid others eight dollars a ton for shells that were cooked out and loaded in the car.

48 I remember of seeing Mr. Figg at Wardell in 1915. When I saw him he was there talking to William A. Blake.

Mr. Wallace: Do you refer to the time when the parties met down here to take depositions in this case?

A. Yes, sir.

Q. You were there, you say?

A. Yes, sir.

Q. You say Mr. Figg was there?

A. Yes, sir.

Q. Do you know whether any depositions were taken?

A. No, sir.

Q. Do you know why?

Mr. Hocker: That is objected to as immaterial.

The Court: That cannot be answered.

Mr. Wallace: Do you know about Mr. Figg getting any witnesses out of the way so their depositions could not be taken?

Mr. Hocker: That is objected to——

Mr. Wallace: I think if he knows, that is competent.

Mr. Hocker: That is calling for a conclusion.

The Court: (to Mr. Wallace): Was that a case pending in this Court?

Mr. Wallace: No, sir, that was the previous case. I think the intent and the facts that we could show to the Court would be very helpful in this case, and that they really have a relevancy concerning the measure of damages.

Mr. Hocker: This was in 1915, two years after the occurrence.

The Court: I don't think it should be answered.

Mr. Wallace: I will withdraw the question as it refers to the other trial of this case.

Mr. Wallace: During this time did you have any conversation with Mr. Figg?

A. No, sir, I never did.

Q. Did you have any conversation with Mr. Blake?

A. Yes, sir.

Q. Did you hear any conversation between Mr. Blake and Mr. Figg.

Mr. Hocker: That is objected to. That was in 1915.

The Court: Did you hear any conversation between them with reference to this case we are now trying?

49 A. I don't know whether it would be this case or not. It was in reference to the business they was doing there.

The Court (to Mr. Wallace): You may examine him.

To which ruling of the Court the defendants, by their counsel then and there, at the time, duly excepted, and their exception was allowed.

Mr. Wallace: You may state what conversation you heard between Mr. Blake and Mr. Figg.

Mr. Hocker: That is objected to as utterly immaterial, too remote, and not binding on the defendants.

Mr. Wallace: The question of agency is disputed.

Mr. Hocker: You have not established any agency.

Mr. Wallace: But we can prove it.

(Here ensued colloquy.)

The Court: I will hear all he said.

To which ruling of the Court the defendants, by their counsel then and there, at the time, duly excepted and their exception was allowed.

COPY BOUND

Mr. Wallace: You may state the conversation you overheard.

A. I heard Mr. Blake and Mr. Figg talking, and I heard this man Figg tell Mr. Blake, he says, "This has not scared me at all. Buy all the shells you can get. I have been behind you and still am behind you," and Blake said——

Mr. Hocker: I move that be stricken out as not binding, and too remote.

Mr. Wallace: That is Figg's declaration.

Mr. Hocker: I am not going to dispute that Mr. Figg is the agent of the defendants. I am not making that point.

I knew Jimmie Warren; he is dead now. He was a farmer down there. He is the one who has been referred to in this case as the care-taker, or the one who had in charge this land of the Trust Company, the local man. I don't know anything about Mr. Blake trying to get a lease of the river from Jimmie Warren.

50 At times people rafted and floated logs for saw-mills on Little River. It was only at different times they did that; when there was a saw-mill on the bank of the river there, and when the stage of the water was high enough they floated logs for the mill by way of the river.

Jimmie Warren would look after the timber *an* the Trust Company land and stop people from cutting timber on it.

Cross-examination.

By Mr. Hocker:

This land was principally timbered. In 1913 and 1914 Jimmie Warren would stop people from cutting timber off it. During this time I dug mussels on it whenever I wanted to, and nobody complained at that time. Jimmie Warren didn't complain but he would stop any timber cutting.

I would dig mussels and Blake would give me so much a box. He would pay me for the amount I dug, at a certain rate: Twenty cents a box would be four dollars a ton if the box weighed one hundred pounds. I sold to other people as well as Blake, including Mr. Rehbehn. I never dug mussels but the two years, in that river. Other people were digging them for, I think, probably three years. I think there was some put out in 1915. I don't remember any digging there before 1913. I used this river to fish in whenever I felt like it, and everybody else did, up and down, above and below Wardell, wherever we wanted to fish. And nobody would bother us if we would not violate the fish law. It was only when the fish law was passed and prohibited fishing at certain times, that we were ever disturbed, then by the fish warden. They were the only people who ever stopped us. During the hunting season everybody hunted there; they hunted ducks when the ducks were there; and nobody bothered them at all, in season. As long as we did not cut timber, Jimmie Warren didn't bother us. I don't know the amount of shells I dug in 1913 and sold to Blake. When I was not digging shells I

CLOSE IN CENTER

was probably doing other work. I don't know. I would not be following around to see where the other boys got their shells. The only personal knowledge I have is that the shells were dug somewhere and brought into Wardell and loaded into cars. Taking the shells all the way through, I didn't see all of them dug. I knew they were dug in the river. I knew they were dug in the river because that is the only place they were. They were brought from some place where they were dug into Wardell and sold to Blake or to Rehbehn or somebody else who was buying shells. All this digging, selling and shipping was done in broad daylight, and
51 open and above board. Nobody had any thought about not having a right to do it, so far as I know. I thought it perfectly proper to do it, and that there was no question about it. Nobody ever sued me for digging shells, or Rehbehn, so far as I know. I could make from three to three and a half a day digging shells. That was about as profitable a business as you could engage in down there, at that time.

There was a saw-mill down there at that time. The stream was used for small craft, small boats and dugouts, to carry provisions and things of that kind. The roads were not particularly good in that country at different seasons of the year. When the river was high the roads would be pretty bad from the water. The principal transportation there would not be by the river, for people going back and forth; but the individuals used it, whenever they saw fit, to carry things. If they wanted to go up or down the river and carry a little amount, probably they would go in boats. If they lived on the river they would carry anything to their homes, back and forth, that way.

Redirect examination.

By Mr. Wallace:

Traveling this way would depend on the height of the water. I have seen the river at times so that you couldn't go in small gasoline boats at all because the water would be too shallow. I have seen the river dry several years back. Jimmie Warren never dug any mussel shells so far as I know. He never told me that I could dig shells.

Recross-examination.

By Mr. Hocker:

Jimmie Warren's wagon hauled shells for people that dug there. I suppose he got paid for this or he would not have done the work. He hauled them off this property to Wardell. That was in 1913.

I am perfectly familiar with this stream called the Little River. I have been up and down it. It empties into the St. Francois which is quite a large stream.

Redirect examination.

By Mr. Wallace:

It was Warren's team he would furnish to haul shells. He would furnish it to any party that wanted the shells hauled. I mean he would hire a team if some one would hire it; and they would pay by the ton.

Mr. Wallace: I suppose the fact that the defendants are resident citizens of the State of Iowa is admitted by counsel?

52 Mr. Hocker: Yes, your Honor.

Mr. Wallace: We would like to introduce in evidence some correspondence, unless its force and effect for a certain purpose would be also conceded, and that is that prior to July 9, 1914, the McKee and Bliven Button Company was notified of the taking of these shells by it, and of the intention of the plaintiff to prosecute a suit for recovery if settlement was not affected. I will not introduce this correspondence if the fact of that notification prior to July 1, 1914, is conceded.

Mr. Hocker: Go on and introduce it.

Mr. Wallace: We introduce a letter from Messrs. Jayne & Hoffman, Muscatine, Iowa, addressed to the attorneys for the plaintiff, in answer to a letter that was written concerning these shells.

Mr. Hocker: I don't think there is anything in this letter that is of material value. Whatever they show as to notice——

Mr. Wallace: The fact of notice is all I am undertaking here to show. I find I have a copy of the letter to which that is an answer.

The Court (after examining letter): Let it go in.

Mr. Hocker: That is objected to as not material, and we except to the ruling of the Court in letting it go in; and the exception was allowed.

Mr. Wallace: We introduce copy of letter written by attorneys for plaintiff to the McKee and Bliven Button Company, dated June 30, 1914, and also an answer to that letter by the attorneys for the McKee and Bliven Button Company, dated July 9, 1914.

The first letter is marked "Plaintiff's Exhibit No. 12," and reads as follows:

(Reading:)

"June 30, 1914.

McKee & Bliven Button Co.,
Muscatine, Iowa.

GENTLEMEN:

The St. Louis Union Trust Company of St. Louis, Missouri, that owns, and holds a recorded legal title to, certain lands in Pemiscot and Dunklin Counties, Missouri, has instructed us to take up with you the question of a settlement for the various shipments of mussel shells that have been taken from a portion of said lands and appropriated by you.

53 No license was given anyone to remove these shells, nor has our client ever sold any of same. The property referred to was, therefore, unlawfully taken, and our client's rights in the matter are clear.

We are writing you before taking any definite steps, but unless a satisfactory adjustment is to be made our instructions to file suit are positive.

Only recently did we discover that these shells had been shipped; but we now have definite information as to the quantities taken, including weights, car numbers, dates, etc.

We are advised that the value of our shells is, and at the times referred to was, $10 per ton f. o. b. point of shipment. In circumstances such as this the owner of the land is entitled, under Sections 5448 et seq. of the Revised Statutes of Missouri, to recover not only the value of the property removed, but treble damages for the trespass.

Kindly let us hear from you at your earliest convenience concerning your attitude toward a proper settlement.

Respectfully,"

—— ——.

W. R.

That letter is signed by Barclay, Orthwein & Wallace as attorneys for the St. Louis Union Trust Company and for Benjamin Gratz, and also for the Himmelberger-Harrison Lumber Company.

The answer to that letter (Plaintiff's Exhibit No. 13") is as follows:

(Reading:)

"Jayne & Hoffman,

Attorneys at Law,

Muscatine, Iowa.

July 9, 1914.

Messrs. Barclay, Orthwein & Wallace,
Attorneys at Law,
214 N. 6th St.,
St. Louis, Mo.

GENTLEMEN:

McKee & Bliven Button Co. of this city, handed us your letter of the 30th ult., in regard to a claim which you make in behalf of the St. Louis Union Trust Company, for mussel shells claimed to have been taken from a portion of the land by said company, and appropriated by McKee & Bliven Co.

54 This Company seems to know nothing about the claim that you make, and supposed that any shells purchased by them, were taken from the Mississippi River, or its tributaries, by diggers, lawfully and properly.

We presume you have looked up the subject of liability for mussel shells taken from the waters of the Mississippi River, or its tribu-

taries in Missouri, and will ask you to advise us by what authority your clients claim to be the owner of the mussel shells in the rivers or waters that flow through their lands, and how it comes you do not get after the shell diggers, or the parties who actually took the shells from the streams.

Will you also advise us by whom the mussel shells you asked our clients to pay for, were taken from your clients land, and when, and by whom and when they were sold or shipped to our clients, so that we may investigate their liability, if any, in the premises, and can advise them intelligently, in regard to your claim.

Yours truly,
(Signed) JAYNE & HOFFMAN."

Mr. Wallace: I also offer in evidence the original bill of lading covering the shells shipped from Wardell, Missouri, August 4, 1914, consigned to William A. Blake, at Muscatine, Iowa, together with a letter written by McKee & Bliven to the delivering railroad in Muscatine.

This bill of lading, all of which I will not read——

The Court: It is a part of the memorandum that you had yesterday?

Mr. Wallace: No, sir; this is one car of which we did not have the record up there.

We offer this for two purposes: One, to show the delivery of this particular car, which is not otherwise shown, and also to show that this car was received after the notice; that the car was consigned by Blake to Blake, and was delivered to McKee & Bliven Button Company by Blake's endorsement. I don't want to read it all, but simply state those facts.

The bill of lading last referred to was marked "Plaintiff's Exhibit No. 14" and is in the words and figures as follows, to wit:

(This exhibit is a bill of lading, in usual form, issued by St. Louis and San Francisco railroad Company to Wm. A. Blake,
55 shipper; is dated, Wardell, Mo., Aug. 4, 1914; states that the consignee is Wm. A. Blake, Muscatine, Iowa; that S. F. car No. 36675, containing shells, was the shipment; and bears an indorsement, in ink, as follows: "Deliver to McKee & Bliven Button Co., Muscatine, Iowa." Said indorsement is signed "Wm. A. Blake." All signatures and other written matter, except as above stated, appear in pencil.)

Mr. Wallace: The letter of McKee & Bliven Button Company to the Railroad ("Plaintiff's Exhibit No. 15") reads as follows:

"McKee & Bliven Button Co.

Muscatine, Iowa, Aug. 21, 1914.

M. N. & S. Ry.,
City.

GENTLEMEN:

Attached hereto find original B/L covering car of Mussel Shells #36675 St. L. & S. F., shipped from Wardell, Mo., on August 4th, and consigned to Wm. A. Blake, Muscatine, Iowa, which carries his endorsement with instructions to deliver this car to us. Please spot this car on Roach & Musser's switch for the Schmalz Button Factory.

Yours very truly,

McKEE & BLIVEN BUTTON CO.
Per G. H. OHLSEN."

G. H. O./F. E. B.

Mr. Hoffman: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

To which ruling of the Court the defendants, by their counsel, then and there, at the time, duly excepted, and their exception was allowed.

Thereupon plaintiff read in evidence certain interrogatories addressed by him to the defendants, and the answer thereto, contained in a certified copy of a part of the record of a former trial of this case in the United States District Court for the Southern District of Iowa, Davenport division. Plaintiff stated that same were offered and read as admissions against interest. Said answers were made and sworn to by the defendant, James S. McKee; and said interrogatories and answers are as follows:

56 "1. State the number of carloads of shells shipped by or to defendant, or by or to defendant's order, from Wardell, Pemiscot County, Missouri (including those waybilled by or to defendant or defendant's order, from Pascola, in the same county) during the years 1912, 1913 and 1914; and give weight in each car and date of shipment."

"A. To the best of my knowledge, we received nine carloads of mussel shells from Wardell, Missouri. The weight of the shells contained in said cars was — pounds."

Int. 2. "From what lands were these shells taken? Give particular description of such lands if you are able to do so, and if not, give the County and State in which said lands lay and the name of the person claiming to be the owner thereof."

A. "Answering interrogatory No. 2, defendant states that all shells purchased by them were purchased in the open market in the usual course of business, and they had no knowledge or information as to where the same were obtained."

Int. 4. "To whom, if at all, was payment for same made?"

A. "Answering the fourth interrogatory, defendant states that payment for said shells was made to the person from whom they were purchased."

Int. 5. "How much, if anything, did you pay for these shells?"

A. "Answering the fifth interrogatory, the defendant states that nine dollars per ton was paid for said shells."

Int. 6. "Do you claim, or have you at any time heretofore claimed, any interest or right in the lands from which these shells were taken? If so, state what this interest is, or was at the time said shells were so taken."

A. "Answering the sixth interrogatory, the defendant states that no interest is claimed by defendant in any land from which shells were taken."

Int. 7. "Did you at anytime make inquiry concerning the ownership of the lands from which the shells were taken? If so, with what result? What did you learn in relation thereto?"

57 A. "Answering the seventh interrogatory, the defendant states that defendant made no inquiry as to the ownership of the land of the Little River until after this suit was brought, and after that time he ascertained that it was a meandered stream, and that consequently, as he understands it, the legal title of the bed of the stream of Little River was in the public."

Int. 9. "What was done with the shells when same arrived at destination?"

A. "Answering the ninth interrogatory, defendant states that the shells received by the defendant were used in their factory in making buttons and button blanks out of such portions of said shells as were fit for said use, the amount thus available being about 50% of the shells."

Mr. Wallace: We offer to read in evidence the depositions of Jake Lemkau, John Butler and Henry Umlandt, for the purpose of showing the value of these shells at Muscatine, Iowa, during 1913 and 1914, and also for the purpose of showing, in connection with the offered testimony of J. E. McClung, the quantity of buttons manufactured from said shells during said years, and the value during said years of said buttons.

Mr. Hocker: That is objected to as not being directed to the proper element or measure of damage in the case.

The Court: I will sustain the objection. That certainly cannot be done.

To which ruling of the Court the plaintiff, by his counsel, then and there, at the time, duly excepted, and his exception was allowed.

(The depositions above referred to are omitted from this transcript because deemed immaterial to a review of this record by the Court of Appeals. For the purpose of this review, their substance is sufficiently indicated by the foregoing statement of plaintiff's counsel.)

Plaintiff hereupon read in evidence the direct examination of the defendant, JAMES S. MCKEE, subscribed and sworn to, contained in

a deposition, taken in this case, in Muscatine, Iowa, in April, 1917, notwithstanding that said defendant was present in court when this deposition was offered and read. Plaintiff offered and read
58 same partly as admissions and partly as the foundation for the order theretofore made requiring the production of certain papers. Before same was read, counsel for plaintiff again referred to the requirements of said order, whereupon counsel for defendants stated that the defendants had already produced all of such papers that they were now able to produce and that they were ready to offer testimony to account for such papers as were not produced.

Said examination was then read by Wallace, and the same (partly in substance and otherwise literally) is as follows:

Direct examination.

By Mr. Warner, for plaintiff:

My name is James S. McKee and I live in Muscatine, Ia. I am connected with the McKee and Bliven Button Company. I am the McKee whose name appears in the title of that firm which was a partnership, until the death of Mr. Bliven. I am the owner at this time. My former partner, Mr. Bliven, is dead; and the interest that he formerly held has been acquired by me. This firm was a partnership during his life, and up to the time that I acquired his interest from his estate. He and I were the only partners.

I am acquainted with James S. Figg. He has been in our employ as a purchaser of shells; looking after the purchasing of shells for our factory. I am not sure when his time began, whether it goes back to 1913 or not. I remember of coming into the possession of certain shells which came from Pemiscot County, Missouri, in the year 1913. A number of them came from Wardell and other points in Missouri, not far distant from Wardell. During the time that these shells were received, I think Mr. Figg was in our service. He looked after our interests in the purchase of shells. It was part of his business to look up beds of shells for us. I really don't know how long he had been so engaged prior to the time mentioned. I have never been down to Pemiscot County. During the year 1913 and 1914 we received nine cars of shells from Wardell, Pemiscot County. I think there were about three hundred tons.

"Q. Now, who arranged for the digging or taking out of those shells from the stream in which they were found?

A. I can't tell you, Mr. Warner.

Q. Did Mr. Figg attend to that?

A. No, sir.

Q. From your former answer, I judge that was part of his business to look after beds and arrange for taking them out?
59 A. Not in this particular case.

Q. I am asking about his business generally.

A. I have already answered that, Mr. Warner.

Q. Well, his business generally was looking up beds of shells and then making arrangements for taking them out at your expense?

A. No, sir.

Q. Now, didn't he do that, Mr. McKee?

A. No, sir; that wasn't his business generally.

Q. That was part of his business as one of your employees, was it not?

A. No, sir; I couldn't say that it was.

Q. You say you were never down to Pemiscot County?

A. No, sir; never was.

Q. Was Mr. Figg there, do you know?

A. Yes, sir.

Q. Did you have communications from him and did you have communications with him from time to time when he was down in Pemiscot County?

A. I may have, I don't know.

Q. Do you keep letter-books?

A. Yes, sir.

Q. Did the McKee and Bliven Button Company keep letters and telegrams received by it and copies of replies thereto from the first of the year 1913, and during 1914?

A. Yes, sir.

Q. Are those telegrams and letters still in existence?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. Who does know?

A. I don't know.

Q. If those letters and telegrams to the McKee and Bliven Button Company during the years 1913 and '14 are still in existence, where are they?

A. I can't tell where they are, Mr. Warner.

Q. I will ask you, Mr. McKee, has it been the practice of the McKee & Bliven Button Company to destroy correspondence received by it in the form of letters and telegrams after the expiration of any given time?

A. It seems to me that's my business.

Q. I wouldn't have asked it if I didn't think it was the business of my client. *Q.* You may answer, Mr. McKee, whether you have in your possession and under your control any letters or telegrams received from James S. Figg from any place in Pemiscot County, Missouri, during the years 1913 and '14.

A. I don't think I am called upon to answer that question, Mr. Warner.

Q. Have you any other answer to make?

A. No, sir.

Q. Are you acquainted with a gentleman by the name of W. A. Blake in Pemiscot County, Missouri?

A. Yes, sir.

60 Q. When did you become acquainted with him?

A. Well, personally not until October, 1916, at the time of the trial in Davenport of this case.

Q. Had you ever seen Mr. Blake before that time?

A. No, sir.

Q. Had you any dealings with him by correspondence of any kind prior to that time?

A. Yes, sir.

Q. Was that correspondence, or written correspondence of dealing between you and him in the form of letters or telegrams, or either?

A. Well, I presume possibly both.

Q. Do you know about how many letters or how many telegrams, or how many of both, you received from Mr. Blake during the year 1913 and continuing down to the present?

A. I have no idea.

Q. Where are those letters or telegrams which you or your Company received from Mr. Blake during that time?

A. I don't know.

Q. Do you know who does know?

A. I don't know.

Q. Who has charge of the correspondence which has been received by you or by the McKee & Bliven Button Company since the beginning of 1913 down to the present?

A. Why, that's my business.

Q. Have you any other answer?

A. No, sir.

Q. You may state whether the letters and telegrams or other written communications received by you or by the McKee & Bliven Button Company, or anybody for it, since the beginning of 1913 down to the present are under your control?

A. Well, I can't answer that question.

Q. You are the sole owner of that business, are you not?

A. Yes, sir.

Q. And you have in your possession, have you not, all the records of the Company from the beginning?

A. No, sir.

Q. Well, they are accessible to you, are they not?

A. I don't think that question is necessary.

Q. You may answer whether the records, the correspondence books the letters and telegrams of the McKee & Bliven Button Company from the beginning of the year 1913 down to the present are under your control?

A. No, sir; not all of them.

Q. Are the letters and telegrams from W. A. Blake of Pemiscot County, Missouri, that you said you received from him in your possession or under your control?

A. No, sir.

Q. Where are they?

A. I don't know.

Q. Under whose control are they?

A. I don't know.

Q. When did you last see them?

A. About the time of the former trial in Davenport.

61 Q. In whose possession?

A. I think they were in my attorney's possession.

Q. Who were your attorneys?

A. Mr. Devitt and Mr. Hoffman.
Q. Which one of the two attorneys had them at that time?
A. I think it was Mr. Devitt, but I don't remember positively.
Q. Then, either those communications are in your possession or in the possession of your attorneys?
A. I don't know where they were.
Q. Do you decline to produce them?
A. Absolutely, when I can't. I don't know where they are.
Q. Have you asked Mr. Hoffman if he had them?
A. Yes, sir.
Q. What did he say?
A. He said he couldn't find them.
Q. Have you asked Mr. Devitt for them?
A. No, sir.
Q. Will you produce those papers?
A. I can't.
Q. Mr. McKee, this is no place to try for a quibble, do you want to be understood here that the correspondence between yourself and Mr. Blake has passed beyond your control so that you don't know where it is?
A. Yes, sir.
Q. And it passed from your control into the hands of your attorneys at the former trial——
A. In Davenport, yes.
Q. And by your order it has never passed out of the possession of the attorneys, has it?
A. No, sir.
Q. And the attorneys you had at that time still represent you?
A. Well, Mr. Hoffman does, but not Mr. Devitt.
Q. Will you undertake to get from Mr. Devitt the letters and telegrams and other written communications I have asked about?
A. Well, I could ask him for them?
Q. Will you ask him for them?
A. I can.
Q. Will you?
A. If necessary.
Q. Will you produce here tomorrow morning the correspondence between yourself or between the McKee & Bliven Button Co. and Mr. W. A. Blake from the beginning of the year 1913 down to the present?
A. I have already replied to that, Mr. Warner.
Q. Have you any other answer?
A. I have not, sir.
Q. Are you acquainted with a man by the name of Lee Cheek?
A. No, sir.
Q. Do you know him?
A. I do not know him.
Q. Do you remember of having any correspondence with him?
A. I have no recollection of him in any way.
Q. There is a gentleman by the name of Field in a bank down in Portage, Mo., have you had any dealings with Mr. Fields, Mr.

62 A. W. Fields, or with the bank of which he is cashier?
A. No, sir.
Q. At any time since the first of the year 1913, did you or Mr. Figg deposit any money in said bank for the use of Mr. Blake?
A. Not that I know of.
Q. Would the books of the Company show?
A. Why, Mr. Warner, the books will show all moneys paid Mr. Blake for shells.
Q. Will they show all money deposited for his use?
A. We never deposited any for his use.
Q. Do you know where Mr. Blake is at the present time?
A. Approximately, yes, sir.
Q. Where is he now?
A. Somewhere on the St. Francois River.
Q. He is still in your employ?
A. I don't know; I think so. I can amend that answer and say at the present time he is not in my employ.
Q. When did he cease to be in your employ?
A. Last December.
Q. Mr. McKee, my attention is called to the fact that Mrs. Bliven is a party defendant in this case; she is administratrix of her husband's estate?
A. Yes, sir.
Q. Or is she executrix of a will?
A. I think she is executrix of a will.
Q. Has she or has Mr. Bliven's estate any direct interest—in the business at this time?
A. No, sir.
Q. Will you state when Mr. Bliven died?
A. December 27th, 1915."

Redirect examination:

"Q. Are you certain, Mr. McKee, not having been on the ground, that Mr. Figg didn't look up the beds of shells in that river or stream in Pemiscot County from which these shells came?
A. Yes, I am certain he didn't.
Q. You were not there to know what he did?
A. We have his expense books which shows what he did.
Q. Do you have those expense books in your possession or under your control?
A. I don't know where it is.
Q. Can you produce it here tomorrow morning?
A. I can't; I don't know where it is.
Q. The expense book will show where he was?
A. Yes.
Q. Will you produce those?
A. No, sir; I don't know whether I could find them or not.
Q. You answered brother Hoffman that you didn't know from what stream these particular shells came, aren't you mistaken there, Mr. McKee?
A. Well, I am not sure. I don't always inquire.

63 Q. I just want to refresh your recollection; you sent Mr. Figg, did you not, down to Pemiscot County to investigate this supply of shells down there?

A. No, sir; to look up Mr. Blake.

Q. To look up Mr. Blake and see what kind of a man he was?

A. Yes, sir.

Q. Didn't know whether Mr. Blake was altogether responsible to take into your services digging shells down there?

—. ——.

Q. Answer it any way, if you can.

A. I have answered.

Q. And you have no other answer to give?

A. No, sir.

Q. Now, Mr. Figg reported to you from Pemiscot County, did he not, that they found shells in this stagnant stream that they call Little River and that Mr. Blake was a very honest fellow and that you could afford to enter into business dealings with him?

A. That question is hard to answer because it covers several points; you confine yourself to one point at a time and I will answer.

Q. Now, did Mr. Figg make a report in writing or by telegram as to what he had discovered as to quantity or quality of the shells in Little River?

A. He made no report in regard to shells.

Q. Did Mr. Figg make any report to you in writing or by telegram with respect to Mr. Blake?

A. Yes, sir.

Q. Have you that writing?

A. No, sir.

Q. Where is it?

A. I don't know.

Q. Do you know who does know?

A. No, sir.

Q. Where are the records of the McKee & Bliven Button Co., the correspondence books, the letter files for the period covered by that correspondence?

A. I don't know.

Q. Do you know who does know?

A. I don't know.

Q. Have you any other answer?

A. No, sir.

Q. Mr. McKee, are you trifling with this examination, or do you actually know where your correspondence is?

A. That question doesn't call for an answer.

Q. You don't know, then, where that correspondence is?

A. No, sir.

Q. About the only reason why you don't produce it here is because you don't know where it is?

A. Yes, sir.

Q. Then you would produce it if you could?

A. Would I have to produce it? I don't know where it is.

Q. And you want to be understood as saying that you don't know

to what person to go, or to what place to go to find that correspondence?

A. The question has been previously answered."

64 Redirect examination continued:

Q. Does it make any particular difference to you in buying shells whether you buy them from an honest man or a dishonest man, if the shells are all right?

A. It makes a difference; one wants to feel assured that the man will load the car with good shells.

Q. These shells were F. O. B. cars Wardell?

A. Yes, sir.

Q. What significance did the fact that Mr. Blake was an honest man, a trustworthy man, have for you?

A. Well, isn't it desirable to do business with honest people?

Q. In making payments or transmitting money to W. A. Blake during 1913 and '14, how was the money sent to him?

A. By checks.

Q. Were these checks issued by you yourself or by somebody in the service of the McKee & Bliven Button Co.?

A. Well, the checks were sent by me, of course.

Q. And you wrote him letters accompanying these checks?

A. I may have written or may not have, I don't remember.

Q. The checks, how were they conveyed to Mr. Blake?

A. By mail.

Q. You didn't procure drafts?

A. I don't think so.

Q. In the course of time the checks that you sent to Mr. Blake were returned to the bank here?

A. I presume so.

Q. Upon or against what bank in Muscatine were they drawn?

A. Well, I presume it was the Cook, Musser Bank at that time that was later changed to Muscatine State Bank.

Q. Well, it is the bank which is now known as the Muscatine State?

A. Yes, sir.

Q. Do you know how many checks you signed and which were sent by the McKee & Bliven Button Co. to Mr. Blake from and after August 13, 1913 and 1914?

A. I don't.

Q. Did you pay money to Mr. Blake until after the shells for which payment was made were received in Muscatine?

A. I don't know.

Q. I have a list of deposits made by Mr. Blake in a bank of which Mr. A. W. Fields is the cashier; that is, one of the checks of the McKee & Bliven Button Co., for $200.00 was deposited in said bank August 13, 1913; do you recall that check?

A. No, sir.

Q. What was that check issued for, for what account was it in payment?

A. That's a foolish question, you ought to know better than ask a question like that.

65 Q. Will you answer it? It doesn't seem so foolish to me.

A. I have answered.

Q. I will put it again, Mr. McKee. For what was the check for $200.00 deposited on August 13, 1913, by Mr. Blake issued, of what account was it in payment?

A. Well, it was in payment for shells, of course.

Q. Now, did you get or had he delivered to you just exactly $200.00 worth of shells at that time, or was it a payment upon an open account between you or your Company and him?

A. The payment, of course, was applied on the shells.

Q. Do you recall whether that is the first payment that you made to him?

A. No; I don't remember.

Q. The next is an item of $371.11 deposited August 19, 1913, do you recall issuing that check?

A. No, sir.

Q. Then, following on the same day, August 19, 1913, there is a check for $21.83; do you remember anything about that check?

A. No, sir.

Q. Now, I asked come questions yesterday as to your acquaintance with Mr. Blake and when you became acquainted with him; I will ask you now, Mr. McKee, if Mr. Blake wasn't in Muscatine and in your office and in your Company along about the middle of August, 1913?

A. I don't remember, Mr. Warner.

Q. Now, to refresh your recollection, isn't it a fact that this check for $21.83 which appears to have been issued by you on the 6th day of August, 1913, was a check given in payment for his expenses in coming up to Muscatine to make some business arrangements with you?

A. I know nothing about the check, but I know that I never paid him anything for expenses.

Q. Do you remember what that check was issued for, in payment of what account?

A. If such a check was issued, it was issued for a payment of shells.

Q. Can you and will you produce, that they may be attached as exhibits to your deposition, each and every check issued by your Company and delivered to W. A. Blake or for him or his account from the beginning of 1913 down to the close of 1914?

A. No, sir.

Q. Have you those checks or are they accessible to you?

A. I can't answer that, Mr. Warner.

Q. Is there any clerk or other person in your employment who could produce those checks?

A. I can't answer it for them.

Q. You may state, Mr. McKee, whether at any time during 1913 or '14 either you or the McKee & Bliven Button

66 Company or any person for it, issued any check or made any payment to W. A. Blake, save in payment for shells received

from him or through him from the Little River country in southeastern Missouri?

A. I want to say, Mr. Warner, that every check that was issued to Mr. Blake by the McKee & Bliven Button Company was issued for shells and nothing but shells.

Q. Now, how many cars of shells did you receive from Mr. Blake?

A. I have already answered that; you have that in your record.

Q. Do you remember how many of those cars were received in 1913?

A. I do not, no sir.

Q. Do you remember how many of the cars of shells were received before you had notice from the plaintiff or his assignors in this case that they were the owners of the shells that were being taken from the river?

A. I do not.

Q. I call your attention to a car, apparently received by you about August the 4th, 1914, being Frisco car #36675 and assigned to W. A. Blake, Muscatine, Iowa; did the McKee & Bliven Button Company receive the shells that car contained?

A. If that is one of the nine cars, I suppose we did.

Q. The other eight cars appear to have been consigned to the McKee & Bliven Button Company, Muscatine, and this car is the only one which was consigned to him; did you receive this car of shells?

A. We got such a car, yes, sir.

Q. You may state, Mr. Kee, whether prior to the receipt of the car by you, you had received a letter from the attorneys of the plaintiff in St. Louis advising you that the plaintiff or the plaintiff's assignors claimed to be the owners of the shells that you were receiving from the Little River in southeastern Missouri?

A. My recollection is that I did.

Q. Have you that letter?

A. I don't think so.

Q. Do you know who has it?

A. I think it was given to Mr. Hoffman.

Q. The Mr. Hoffman who represents you as attorney here?

A. Yes, sir.

Q. Do you know what reason, if any, there was for having the car consigned to Wm. A. Blake in Muscatine rather than to the McKee & Bliven Button Company?

A. You will have to ask Mr. Blake about that.

67 Q. You don't know?

A. No, sir.

Q. Did you or anybody connected with your Company so far as you know suggest that the shipment be handled in that way?

A. No, sir.

Q. What was done with these shells that you received from Mr. Blake; did you cut them into buttons or sell them to other people?

A. That's a foolish question——

Q. I didn't know but what you might have sold part of them to some other factory.

A. Why, they were cut into buttons, of course.

Q. In your factory?

A. Yes, sir.

Q. I believe you have stated, Mr. McKee, that the shells contained in the nine cars that you received from Blake were worth at the time of shipment at Wardell about nine dollars a ton?

(Objection by defendant as he has not said that; Mr. McKee stated that is what he paid for them.)

Q. If you paid for those shells and they were worth about $9.00 a ton at Wardell, what would be their reasonable market value when they arrived at Muscatine?

Mr. Hocker: That is objected to for the same reason as heretofore.
The Court: Objection sustained.

To which ruling of the Court the plaintiff, by his counsel then and there, at the time, duly excepted, and his exception was allowed.

Q. Now, Mr. McKee, you recall on yesterday during the course of your examination I called on you to produce a number of records, letters and telegrams: I ask you again, will you produce those telegrams, letters and other records that I called for on yesterday?

A. No, sir.

Mr. Barclay: If the Court please, we wish to have the record show that we refer to the order made in this Court on May 23, a few days ago, for the production of these papers—all letters, telegrams, copies of letters and telegrams——

Mr. Hoffman: Is that not a matter of record now? You have made it a matter of record; all pleadings are matters of record.

68 Mr. Barclay: What is it you want to object to?

Mr. Hoffman: Is not that a matter of record in this case?

Mr. Barclay: What I am reading now?

Mr. Hoffman: Yes.

Mr. Barclay: His Honor may not be familiar with the particulars of this. Our object in referring to it now is that this deposition of Mr. McKee, one of the defendants, shows exactly the papers that we want.

The Court: Of course the order is a part of the record.

Mr. Barclay: Certainly, and the production of these papers which we tried to obtain at that time——

The Court: If an order has been made and it has not been complied with, there is but one way, so far as the Court knows, of enforcing it.

Mr. Hocker: We have a part of those papers here, I understand, that we will be glad to produce, and——

Mr. Barclay: We want to have whatever they produce, and if it is not all that this order calls for we shall ask to have an explanation made, or deal with the matter in whatever way is proper at that time. What we want to do is to get whatever they have.

Mr. Hocker: Here are some of the papers.

Mr. Barclay: There are produced here fourteen books called "Star Report & Expense Book. Salesmen for McKee & Bliven Button Company, Muscatine, Iowa."

There are also produced two leaflets from a looseleaf ledger, pages 125 and 130, with the name "W. A. Blake" and "James Figg, sheet money advanced."

Mr. Hocker: We have the bookkeeper to show that these are the only pages that have any account with Mr. Blake on our books.

Mr. Barclay: Now we would like to have the letters and telegrams between Mr. Blake and the defendant.

Mr. Hocker: I haven't them and I will undertake to make no showing on that, your Honor.

The Court: What further do you desire, Judge Barclay?

69 Mr. Barclay: These are produced for the first time, and we shall ask that the case be kept open. It is about time for us to adjourn, anyhow.

The Court: We may as well determine this matter right now. This Court made an order for the production of certain documents and you contend they have not been produced, so I suppose some kind of an application or rule to show why they should not be punished for violating the order should be——

Mr. Barclay: We are not making that application at this time because we have always assumed that these papers would be produced when the proper process was issued. Mr. McKee was being examined——

The Court: The Court has a right to inquire into this matter. This order was made by the Court. Now if you desire that I should make a rule on them to show cause——

Mr. Hocker: I am ready to do that right now, your Honor.

Mr. Barclay: We are going to make a different application as soon as we have a chance to see what they have given to us. Perhaps we might have enough evidence here which, of course, we have no knowledge of.

The Court: You are content at this time?

Mr. Barclay: No, we are not content, because the main thing that we desire are the telegrams and letters between Mr. Blake and these people, as you noticed in the deposition, in regard to agency. We haven't a single paper here of that character.

Mr. Hocker: There never was such a paper.

The Court: You can show what efforts you have made to——

Mr. Hocker: Shall I undertake to do that right now, your Honor?

The Court: Yes, and I will dispose of it.

Mr. Hocker: Very well; I will call Mr. McKee.

JAMES S. MCKEE a witness of lawful age, being duly sworn and examined, testified in substance on behalf of the defendants as follows:

70 Direct examination.

By Mr. Hocker:

Q. Give us your name and address, please, Mr. McKee.

A. James S. McKee: Muscatine, Iowa.

Q. What is your business?

A. Manufacturer of pearl buttons.
Q. You are one of the defendants in the case, are you?
A. Yes, sir.
Q. Certain papers and documents were called for to be produced
r us under an order made by the Court on last Thursday: You were
lvised, I believe, by Mr. Hoffman of the issuance of that order?
A. Not definitely; he said we might be called for them.
Q. Did you make an effort to find everything connected with your
insactions with Mr. Blake?
A. Yes, I did when he told me about it.
Q. You had some litigation in Davenport, Iowa, with reference to
is same matter, had you not?
A. Yes sir.
Q. At that trial did you have all of the papers that applied to
at transaction, that pertained to that transaction?
A. We had the important papers, yes.
Q. Was there any correspondence between you and Blake, and
so, to what extent was that?
A. Yes, there was some correspondence had with him, naturally.
Q. Do you know whether those letters were at the last trial?
A. We had them in Davenport with our other papers in the case.
Q. Who represented you in the trial of that case?
A. Mr. Hoffman and Mr. Devitt.
Q. Who had possession of those papers at that time?
A. I don't know which attorney, but one of them carried a little
ack grip that had these papers in it.
Q. Did you have these expense accounts that have been produced
re?
A. No, sir; those were in the book. We didn't have those. You
an the ledger sheets?
Q. No, these little books.
A. No, sir, we didn't have those.
Q. You produced those under the present demand?
A. Yes sir.
Q. Do you know what became of those letters at that time that
ssed between you and Blake?
A. No, sir, I do not.
Q. Have you made inquiry of Mr. Hoffman for them?
A. I did.
Q. Were you able to——
A. (Continuing:) At the time those depositions were taken.
Q. Were you able to find any of them?
A. I did not.
Q. What was the other counsel's name?
A. Mr. Devitt.
Q. Did you call on him for any papers that he had?
A. Yes sir.
Q. What were you able to secure from him?
A. The only papers that he had was a map which I brought
ng; a map of the river, I think, in Penobscot County, or whatever
county was where Wardell is.

Q. Did you get from him any correspondence that passed between you and Blake?

A. None whatever.

Q. You keep a file of transactions of this kind in the regular course of business?

A. Yes, sir.

Q. What happens to those files from time to time; what is done with them?

A. As the files become full the unimportant papers are taken out and are generally sent and sold for old paper.

Q. How long do you keep correspondence of that kind?

A. No regular period.

Q. Where a matter is closed, how long about do you keep it?

A. Well, there is not any stated period.

Q. Does the young lady who has charge of the business end of your office attend to that?

A. Yes, sir.

Q. Is she here in Court?

A. Yes, sir.

Q. Do you know what her custom is with reference to going through the files that are disposed of, or as you suppose are disposed of?

A. Well, that is her custom.

Q. Have you made search everywhere you can think of to find these papers?

A. I have.

Q. Have you, or anybody under your direction, or at your suggestion or command, disposed of these papers for the purpose of getting rid of them for this law suit?

A. No, sir, I didn't.

Q. Was there anything in those papers that would cause you not to want to produce them?

A. No, sir.

Mr. Barclay: We object to that.

The Court: Objection overruled.

Mr. Hocker:

Q. You have no disposition or purpose to keep from his Court or the inspection of the other side, any papers that the Court thinks proper for them to have?

72

A. No, sir

Q. So you have not at this time in your possession, and you do not know where any of the correspondence with Blake is?

—. All correspondence I have, all the papers, are produced here.

Q. When the trial in Davenport was ended you supposed the matter was ended?

A. I thought that was ended.

Q. You thought that was the end of the matter?

A. Yes, I thought that was the end of the matter. We really were careless that we didn't save the papers. I am sorry we didn't

Cross-examination.

By Mr. Barclay:

Q. When were these depositions taken from which your evidence was recently read?

A. I couldn't tell you. You have the dates on there. If you will hand me the papers I will tell you.

Q. When was this deposition taken that was just read?

A. Indeed I can't tell you.

Q. Was it taken this year or last year?

A. It was taken in 1916.

Q. 1916?

A. 1917.

Q. What time of year?

A. Sometime in the ealy part of the year.

Q. You refused to produce those papers at that time, did you not, before the notary?

A. Yes, sir.

Q. And did not one of your young ladies testify at that same taking of the deposition that those papers were there in your charge?

A. I don't think she did.

Q. What did you say?

A. I don't think she did.

Q. Did you not hear her answer?

A. I think I did.

Q. Did she not say those papers were not to be produced because you directed her not to produce them?

A. She did not say that.

Q. Are you sure?

A. I think so.

Q. Did you not direct her not to produce any papers at that trial?

A. I did not.

Q. Or, rather, at that hearing: But you did not produce them; you produced no papers of any kind that you were asked to do at that hearing: Is not that so?

A. No, sir.

Q. Sir?

A. No, sir; I did not produce any.

Q. Did you not tell counsel for plaintiff that it was none of his business, practically——

73 Mr. Hocker: Counsel has read the testimony.

Mr. Barclay: The question of his purpose and intent is involved in this inquiry

The Court: He has answered in the deposition The deposition speaks for itself.

Mr. Barclay: I am speaking of his intent and purpose.

The Witness: I would like to explain this, if my people don't care.

Mr. Barclay: Go ahead.

The Witness: Would you like me to explain?
Mr. Hoffman: There is no explanation required.

The Witness: As has been already testified there, in December, December 27, Mr. Bliven died. Mr. Bliven was my partner; we were equal partners in the business. In October 1916 (he died in 1915) I purchased his undivided one-half interest. The business was mine. Miss Rueling (that is the lady that is here) that files the papers, has been in the habit for a long period of time, of taking out certain unimportant papers from the files in order to relieve congestion. We have these files—it does not make any difference, but they are common files. When it came that year there was a great demand for paper at a high price, a price for waste paper that was never known. It was suggested that all the paper about the place be cleaned out. I told them that every unimportant paper in that file—inasmuch as our business relations had closed and we were starting in new, could be taken out of the files. There is the history of the whole thing. That was the unimportant papers. The important papers, as I have told you, were in the files at the trial in Davenport. The last time I saw some of those papers I was trying to explain to Mr. Wallace in regard to several cars of shells, the number of tons, and the evidence (which we don't deny) that we purchased those shells. Those papers were in that same envelope. Whether the attorneys took them home, I don't know.

By Mr. Barclay:

Q. That was last year?
A. That was at the trial in Davenport.
Q I am talking about when these depositions were taken.
A. I am talking about the whole thing. I tell you the important papers were there, and that was the last time I saw them that had any bearing on the case. The other papers were left in the
74 file and they were destroyed right after inventory in 1916, so far as I know. When they were, I couldn't tell you.
Q If that is the case why did you not say that at the time this order was made upon you, last year when the deposition was taken a year ago in this very case, why did you not give this explanation at that time?
A. Do you want me to answer that?
Q. Certainly.
A. I considered this case as a persecution, not a prosecution. We tried the case out in Davenport once and won. You brought it again. I didn't think it necessary to answer the questions, and that is the reason.
Q. And that is the reason you did not tell that the papers were destroyed, but gave us to understand that they were in your possession?

Mr. Hoffman: He did not——
Mr. Barclay: Did not one of your young ladies testify at that time in regard to these papers? I mean one of your office force, did she not testify at the same time you did about that matter?

A. She testified.

Q. Did anybody say a word about these papers having been destroyed?

A. No, sir.

Q. Not a word. These expense accounts were not destroyed, and these ledger accounts were not destroyed?

A. No; the books were kept.

Q. Is this all that you want the Court to understand that you have remaining of the correspondence of any sort?

A. Yes, sir.

Q. Sir?

A. Yes, sir.

Q. About what time did you write your first communication to Mr. Blake?

A. In——

Q. What time in 1913?

A. It was in July, 1913, I believe.

Q. It was in July, 1913?

A. I think so, yes. It was a short time before the first car was shipped. If you will give me those shipments, I will tell you.

Q. He came to Muscatine and saw you before that shipment took place, did he not?

A. No, sir.

Q. How did you come to get into communication with him for the purpose of business?

A. Mr. Blake wrote me and sent me samples of shells.

Q. When was that?

A. In July, I believe.

Q. You answered that letter?

A. I certainly did.

Q. Then you gave him directions to proceed, in that letter?

A. I don't know if I did so in the letter.

75 Q. Do you know whether at that time——

A. The correspondence consummated in my purchasing shells.

Q. Did you not in that letter which you wrote in answer to his letter, tell him that you wished him to purchase these shells for you there if it could be done?

A. I never asked him to purchase any shells for me.

Q. Who was he to purchase for?

A. I bought them at a price. I gave him a price that I would be willing to pay for such shells, F. O. B. Wardell.

Q. Don't you keep copies of letters that pass between you and those with whom you do business, apart from the originals?

A. My dear sir, I have already told you about that.

Q. Did not one of your young ladies testify on this same occasion, a Miss Reuling?

Mr. Hoffman: Miss Reuling knows what she testified to; ask her. He don't know.

By Mr. Barclay:

Q. That she has no right to take them from the office without your instructions, and that you had forbidden her to do so?
A. That is true.
Q. You heard that?
A. That is true.
Q. If the papers were not in existence how could she say that?
A. She could say that without any papers. She will answer for herself; she is here.
Q. Did you not at that time instruct her not to produce those papers,
A. There were no papers to produce.
Q. That was not my question. Did you not instruct her not to produce any papers?
A. How could I instruct her when there were no papers to produce?
Q. I want you to answer my question: Did you not instruct her not to produce those papers before the notary?
A. I couldn't instruct her not to do that when I didn't know whether the papers were there or not.
Q. Did you not say to her not to produce the papers before the notary where this examination of yourself and the other parties was going on in Muscatine?
A. I couldn't, not when I did not know whether the papers were there.
Q. I ask did you not instruct her not to produce those papers at that time?
A. I have answered the question.
Q. Well, answer it again. I don't think you have answered it.

76 The Court (to the witness): Answer the question.

A. Ask it again.

(Previous question read.)

A. No.

By Mr. Barclay:

Q. You did not?
A. No, sir.
Q. Did you tell her to produce them?
A. No, sir.
Q. You neither told her to produce them, nor not to produce them?

The Court (to Mr. Barclay): He has so testified.

By Mr. Barclay:

Q. How many letters were there that passed between you and Blake during the time that these shells were being taken out and shipped to you; about how many, approximately?

A. I couldn't tell you that.

Q. Well, were there five, ten or twenty?

A. No; there was a period of several months when we bought shells.

Q. There was a lot of correspondence between you and Blake in relation to the financial matters connected with this transaction, was there not?

A. There couldn't have been much. There were only nine cars of shells.

Q. What became of those checks with which you paid these bills?

A. The checks went with the papers.

Q. You mean they were destroyed?

A. Yes; I presume so.

Q. Did he give any receipts or bills of lading, or any kind of a memorandum showing these transactions with him; did you keep the receipts to show what happened?

A. There are the records in the book.

Q. What records?

A. The ledger accounts show every transaction.

Q. I mean apart from your books, did you not have any receipts or papers of any kind signed by Blake, to show that these shells were paid for?

A. He was paid by check.

Q. That was not my question. Did you not keep any record, did you not keep a check or some receipt, or anything to show?

A. We kept them until when——

Q. When?

A. Perhaps the fall of 1916, or spring of '17, at the time when these papers were cleaned up that I told you about.

Q. This suit had been already brought when you destroyed these papers, had it not?

A. I don't know.

Q. What do you say?

A. I don't know.

77 Q. Did you not say that they were destroyed?

A. There had not been any request for any papers.

Q. Did you not say you destroyed these papers in the fall of 1916, a little while ago?

A. They possibly were, yes.

Q. But what did you say here now?

A. I said they were, yes, but I don't have no positive knowledge of it. The young lady went through the files from time to time and cleaned them up, and when those were taken up I don't know.

Q. Did you not say a few moments ago that those papers were destroyed in the fall of 1916?

A. I don't know just when.

Mr. Hoffman: He said that the business letters——

By Mr. Barclay:

Q. Did you not say that?
A. Well, I guess I said it.
Q. Was not this suit brought in the spring of 1916, this present suit?
A. I don't know; I believe it was.
Q. Have you not destroyed those papers since the suit was brought.
A. Yes, they have been.

ELLA REULING, a witness of lawful age, being duly sworn and examined, testified in substance on behalf of the defendants as follows:

Direct examination.

By Mr. Hocker:

Q. Please state your name.
A. Ella Reuling.
Q. You live in Muscatine, Iowa?
A. Yes, sir.
Q. Are you employed there?
A. By Mr. McKee.
Q. How long have you worked there?
A. Just thirteen years this month.
Q. What part of his business do you have to do with?
A. I am a stenographer. I take care of the mail, get the mail in the morning and open it, and answer the greater part of his letters, and take care of his orders.
Q. Say that over again.

The Court: I don't believe the jury can hear you.

A. I get the mail in the morning and open it, and answer most of Mr. McKee's letters; take his dictation and take care of his orders.

By Mr. Hocker:

Q. So you handle the office end, in connection with Mr. McKee; you are his secretary or stenographer, and look after the office part of the business, or at least part of the office end?

78 A. Yes, sir.

Q. Have you had a custom in that office from time to time of clearing out your files and destroying old letters which are unimportant correspondence?
A. Yes, sir.
Q. How long have you had that custom?
A. Well, since about 1911 or '12.
Q. How often do you do that; how old does a transaction have to be; how long is it closed up before you do that?

A. Some letters we keep six months, unimportant ones. Others we don't keep any longer than a year.

Q. You clean them out of your files and what do you do with them?

A. Tear them up so that they cannot be read, and we have been selling them. The way we started, the school children saved old papers; we saved all the old magazines and old papers we would get together, and then we took this unimportant correspondence and destroyed it so it could not be read and boxed it and then the stenographer in the office—when the school children were through we sold it, and then the Red Cross became interested and we gave to them, and then to the Welfare Association.

Q. Were you doing that in 1916 and 1917?

A. Before that.

Q. And during those years?

A. Yes, sir.

Q. Do you have in mind this particular matter of Blake's papers in this particular case, or did you go through that file with the others?

A. I go through that file, start at the letter "A" and go through, as I have time.

Q. And whatever you think is unimportant and ended you destroy?

A. Yes, sir.

Q. Do you remember when you were called as a witness, when depositions were taken sometime, I think perhaps last year?

A. Yes, sir.

Q. Did you have in your possession then any papers belonging to this Blake controversy?

A. I did not.

Q. Were there any in your office, so far as you knew?

A. Not that I know of.

Q. Did you refuse to produce any particular papers that you had in your possession at that time?

A. Yes, sir.

Q. I say, any particular papers?

A. I refused to produce any papers. I felt they were not my property.

Q. You felt that it was not a matter for you to pass on whether you would produce or not?

79 A. I felt I had no more right to those papers than to Mr. McKee's money in the cash drawer

Q. Did you have in your possession any correspondence between Blake and Mr. McKee, or his Company, at that time which you refused to produce?

A. No.

Q. Or checks, or anything of that sort?

A. No, sir.

Cross-examination.

By Mr. Wallace:

Q. Is this your signature I show you there, Miss Reuling?
A. Yes, sir.
Q. Your deposition in this case, together with Mr. McKee's, was taken about a year ago in Muscatine, Iowa?
A. Yes, sir.
Q. You and Mr. McKee and others were present in the room where they were taken?
A. Yes, sir.

Mr. Hocker: Did Mr. McKee tell you not to produce any papers in this particular case?
A. He did not.

Mr. Wallace: He testified first and then you and Mr. Ohlsen also testified?
A. Yes, sir.
Q. You have been in the Court-room, have you not?
A. Yes, sir.
A. Yes, sir.
Q. When were these letters we were speaking of here, destroyed?
A. I can't tell you. I start——
Q. As I understood you just now, you say they were destroyed before this deposition was taken?
A. They may have been. I go through the files and if they are unimportant—I considered the shell letters unimportant and they were destroyed.
Q. You got a subpœna with the seal of the court up there on it, directing you to produce certain papers, did you not?
A. Yes, sir.
Q. The papers we refer to here?
A. Yes, sir.
Q. And you were sworn and gave your deposition?
A. Yes, sir.
Q. You were asked whether you had certain letters and copies of letters in your possession?
A. I was asked that.
Q. I will ask you if this question was not asked you and the answer given: (The period here referred to is 1913 and 1914).

"Q. And with respect to communications in writing received during the period covered by the preceding question what system was observed in said office?
A. They were filed right with the copy of our reply.
80 Q. Then you have letter and response filed away together?
[A.] A. Yes, sir; right together."

You were examined at some length, Miss Reuling?
A. Yes, sir.

Q. I will ask you if this question was not asked you, and answered by you as follows:

"Q. Have you and can you produce all of the letters that were written, or copies of all letters that were written by the McKee & Bliven Company to Mr. Blake during 1913 and '14?

"A. Why, I never produce anything of Mr. McKee's; it isn't my property; I don't produce it to anyone without Mr. McKee's consent."

Do you remember that?

A. Yes, sir.

Q. I will ask you if this question was not asked and answered:

"Q. But you have it under your control so that if permitted to do so, you could produce it?

A. Why, as far as I know."

You received the subpœna calling for these papers and of course you made a search; I presume you looked around?

A. No, I did not.

Q. Oh, you didn't look around?

A. When that subpœna was read to me I read it to Mr. McKee. I was taking dictation, and I said, "I can't produce these until you tell me to." He did not say anything.

Q. You came in obedience to the subpœna but you didn't bring any papers?

A. He did not tell me to, and they were not my papers.

Mr. Hocker. You did not look to see if they were there?

A. I didn't know whether they were there.

Mr. Wallace. This question was asked and answered by you.

"Q. Didn't you notice that your subpœna called upon you to produce them?

A. I did, but when I read it I mentioned to Mr. McKee that I didn't have any right to bring them.

Q. You noticed that the seal of the Court was on it?

A. Yes; he had the same subpœna.

Q. What reason did you have for not producing these letters and telegrams and copies of answers that your subpœna commanded you to bring?

81 A. Mr. Warner, I never have taken anything from the office that wasn't mine. I asked if they could tell me to produce anything that was not mine."

On cross-examination by your attorney at that time, Mr. Hoffman asked you this question:

"Q. Miss Reuling, as a matter of fact these books and papers are not under your control?"

and you made this answer:

"A. Well, under Mr. McKee's instructions they are."

Are you able to tell us more particularly than you have done, t
date when these particular letters from Blake to the Button Co
pany were destroyed?

A. No, sir.

Q. What is your explanation, Miss Reuling, to the Court and ju
here now as to why in this lengthy examination a year ago concer
ing this matter, neither you, nor Mr McKee, nor his bookkeep
had anything at all to say about ever having destroyed any papers

Mr. Hocker: She is not required to make any explanation. S
may answer any question put to her.

The Court: She may answer.

Mr. Wallace: What is your explanation as to why that reas
that is given here today was not given a year ago in Muscatine
these depositions?

Mr. Hocker: I think she can speak for herself.

Mr. Wallace: I mean for herself.

A. I don't know whether they asked me whether I destroyed the
Did I not state at that time that we had been destroying papers?

Q. I don't think you will find anything like that in the deposition
but I want to know why it was that during all that examinati
about these papers you could have failed to have said anything abo
their having been destroyed, if such was the case?

A. Well, I don't know.

Q. When did you first find out that they had been destroyed?

A. When did we first find out?

Q. When did you find out?

A. I never have found out. I haven't gone through the fil
I know how far we keep our correspondence, and I have taken
for granted that they have been destroyed after keeping
82 months or a year. Shell letters would be perhaps six month
They are very unimportant.

Q. Do you personally attend to that?

A. Yes, I do. I am the only one in the office who attends to

Q. Then you are the one who destroyed these letters we have be
referring to here today?

A. I don't know, those letters in particular.

Q. But they must have been destroyed by you because that is yo
business, is it not?

A. Yes, sir.

Q. You never remember to have done it and the last anything
known by you of the whereabouts of those papers is when Mr. McK
had them at the trial at Davenport, is it not?

A. Yes, sir.

Redirect examination.

By Mr. Hocker:

Q. You were asked these questions in the deposition, and answer
them as follows:

"Q. Do you know whether those papers or letters that Mr. Warner inquired about are in the office at this time?
A. No, sir.
Q. You don't know where they are?
A. No; I don't know anything about them; I file things when they come in and pay no more attention to them.
Q After receiving this subpœna directing you to produce those papers, did you see whether they were in the file at the office?
A. No, sir."

So at that time you did not know whether those papers were there or not, or whether they had been destroyed as was your custom, or whether they had not been destroyed?
A. No, sir.

Recross-examination.

By Mr. Barclay.

Q. There have been some papers produced here, presumably in response to this order. Have these papers been in your charge?
A. No, sir.
Q. Where do they come from?
A. The bookkeeper has them.
Q. Do you know what they are?
A. They are expense books.
Q. Whose expense books?
A. I don't know.
Q. Look at them (handing books to witness): Can you tell from those papers what expense accounts those are?

The Court (to the witness): Answer the question.

A. There is nothing here to indicate it, but it looks like Mr. Figg's writing.

Mr. Barclay: There is nothing in those books to show whose expense accounts those are, except that you think that is Mr. Figg's handwriting?
A. I think it is.

Q. Does anything whatever in those books refer to this transaction in Pemiscot County, Missouri?
A. I don't know, because I don't have anything to do with the book work, or the expenses.
Q. Are these files within your charge?
A. These?
Q. Yes.
A. No; I have nothing to do with them at all.
Q. Then there are files not in your custody?
A. Simply the expense account. I take charge of the correspondence.
Q. What files do you have charge of?

A. Correspondence.
Q. Correspondence and telegrams, I suppose?
A. Yes.
Q. And not the expense accounts?
A. No; I have nothing to do with that.
Q. Do you keep also the ledger and these book accounts?
A. No, sir; I have nothing to do with that.
Q. Do you know where they came from?
A. I don't have them at all.

Mr. Hoffman (to Mr. Barclay). She has told you she knows no ing about them.

Mr. Barclay: Then none of these papers are in your custody?
A. No, sir.
Q. These little books you say you assume to be Mr. Figg's accou but there is nothing in them to show that fact?
A. I think they are his accounts.

Mr. Wallace: The plaintiff will rest, your Honor.

(Defendants' Motion for a Directed Verdict Presented and Ru Thereon Deferred; Motion to Require Plaintiff to Elect Overr and Exceptions Thereto.)

Thereupon defendants presented a motion for a directed ver and filed a motion to elect.

The Court announced that he would hear defendants on the and motion for an instructed verdict later, and overruled the mo to elect, to which action of the Court the defendants, by t
84 counsel, then and there, at the time, duly excepted and t exception was allowed.

And thereupon the defendants, to sustain the issues in their beh introduced the following evidence:

JAMES S. MCKEE a witness of lawful age, being duly sworn a examined, testified in substance, on behalf of the defendants as f lows:

Direct examination.

By Mr. Hocker:

I am one of the defendants, and am in the button manufactur business in Muscatine, Iowa; have been in that business since 18 making buttons out of mussel shells, fresh water mussel she Mussel shells come out of nearly all the rivers tributary to the M sissippi River. We use about four thousand tons of shells a year our business. We purchase these shells from others. This has alw been our custom. We don't gather shells ourselves. In 1913 a 1914 Mr. Figg was in our employ. His business was to go from pl to place either buying shells or investigating rivers that might h

new supply, investigating the source of supply for our business. believe it was July 1913 when I first came in touch with Mr. Blake. e initiated the acquaintance; he wrote me and submitted a small mple of shells which I examined; out of that the business relations tween us arose to the extent of purchasing nine cars of shells. That s during the months of July, August, September and October of 913, and August, 1914; summer of 1914, I believe it was August; July or August. Altogether there were nine carloads, aggregating me three hundred and seven tons, or thereabouts. I knew nothing bout whether they came off any particular property, and specific operty. I knew they came from down in the Little River district, om the fact that they were shipped from Wardell. The majority f these shells were a variety we usually call three-ridge. They were n inferior shell. I paid Mr. Blake exactly nine dollars a ton F. O. Wardell, for them. I paid the freight from there to Muscatine. did not pay Blake any commission or salary during that time. The ofits he had came out of the nine dollars. I paid him nothing ex- t the agreed price of the shells. I was not concerned or interested s to where the shells came from at the time I bought them. I did t know where they came from, any particular land.

I sent Mr. Figg down to investigate Mr. Blake.

Mr. Hocker:

Q. What was the reason for that, Mr. McKee?

A. Shall I tell the story?

Q. Yes, certainly. What was the occasion of your investigating?

A. Blake shipped one car of shells and he——

Q. That was the first one?

A. Yes. He stated he was entirely out of funds, if I remember rrectly; there were some shells that he could buy there if he had oney, so as soon as the bill of lading came in with the statement to the number of tons in the car I immediately remitted him for at car, which is a common practice with us.

Q. Then did you——

A. Then with those proceeds he started to buy shells, but as most his shells in the first car belonged to other parties, his funds of ourse were limited. Then he requested me to send him some money, nd it to him, until he could get enough shells to ship another car. his I did. For some reason or other he was out of money again efore he could get a car, and wanted another loan. Well, I didn't now the man; I never saw him, and I didn't know anything about m in any way, and as I had my own representative looking after s business I sent Mr. Figg to see whether or not he was worthy of y further advances.

Q. That was the purpose of sending him down there?

A. Yes, sir.

Q. Did you get a favorable report from Mr. Figg as to his in- grity and character?

A. Yes, sir.

Q. And on the strength of that did you make any other advances money with which he might buy shells?

A. Yes; as a car came in I remitted promptly, and in that way carried on the business to the extent of the nine cars—eight cars nine.

Q. The last car came quite some———

A. It came the following year; yes; eight cars the first year.

Q. You paid him promptly as the stuff came in and he would buy other shells and send to you, and then you would remit again?

A. Yes, sir.

Q. And that is the way the business was transacted?

A. Yes, sir.

Q. Did you send him separate checks at any time for any of the cars?

A. Yes, sir.

Q. What was the reason for that?

A. At his request.

Q. Do you know why?

A. Well, I found out since why.

86 Q. But it was at his request: What was the difference, how much did you send?

A. Fifty cents a ton in one check and $8.50 a ton in another check.

Q. What request did he make with reference to that?

A. He did not explain it at the time, only he requested that each remittance should be sent in two separate checks.

Q. You afterwards found why?

A. Yes, sir.

Q. What was the reason?

A. Well, he wanted to get two commissions out of the boys. That was the truth of the matter. He wanted to show his check, so he said, for $8.50 a ton, leading the boys to believe that that was all he got out of the shells.

Q. To enable him to control the price of the shells that he paid for?

A. Yes, sir.

Q. When you bought these eight carloads of shells had you received any advices or information at all or complaints from anyone with reference to the source from which these shells came?

A. When I was purchasing the shells?

Q. When the first eight cars were delivered to you?

A. No, sir.

Q. You had no knowledge of anyone complaining about them being taken off any particular tract of land, or anything of the sort?

A. No, sir.

Q. Those were shipped directly to the Company at Muscatine from Wardell, were they?

A. Yes, sir.

Q. Via Pascola; they were billed from Pascola?

A. I don't remember where they were billed from.

Q. You have been buying shells ever since you have been in business?

A. Yes, sir.

Q. Had you ever heard of any person ever making complaint, in your business or anybody's else business of a similar kind there in Muscatine, or elsewhere, about taking shells from off waters running through the lands of owners?

Mr. Barclay: We object to that, your Honor.

Mr. Hocker: It goes to the question of good faith.

The Court: He may answer.

To which ruling of the Court the plaintiff, by his counsel, then and there, at the time, duly excepted and the exception was allowed.

A. We never had any objection from any body, nor have I heard of anybody else having. This is the only case.

Mr. Hocker:

Q. In the whole trade——

A. In the whole history of the button business.

Q. That is the first time you ever had any complaint of that kind?

A. Yes, the first one.

Q. What localities have you?

A. Nearly every river of any size that is tributary to the Mississippi River, from Mississippi to Wisconsin and Minnesota, and from Pittsburgh to Omaha and Kansas City.

Q. Did you ever pay Mr. Blake any commissions for selling you any shells at all, or for getting you any shells?

A. There is only one price that I ever paid to Mr. Blake, and that was a net price, nine dollars a ton, F. O. B. cars Wardell.

Q. You bought them from him at that price?

A. Yes, sir.

Q. Did you pay any other commissions other than that?

A. No, sir.

Q. As to this last carload: You had been notified at that time, shortly previous to that car, about the claim of Mr. Gratz to these shells being taken off his property, by a letter from his attorney?

A. Yes; sometime before.

Q. Did you take that matter up with Mr. Blake?

A. I presume I did; I am quite sure I wrote to Mr. Blake about it.

Q. Did you receive any assurance as to where those shells came from?

A. I couldn't tell you about that.

Q. I am speaking of the last car.

A. The last car?

Q. The last car, yes.

A. Well, as I remember it, he wrote me and said that he could get another car of shells. My answer, I believe, was that I was not interested in any more shells from this territory, stating why. He represented to me—no, I think then that he asked me to send him some money to handle the shells, whether I bought them or not.

Then after he purchased the shells, as I remember, he asked whether or not I intended to buy the shells. Up to that time I had not stated. He wanted to know how to bill them. I didn't answer him. The shells then were on the road and he sent me the bill of lading and asked me to take them in, and at the same time stating they came from another point on the Little River, the land of which was not questioned, unquestioned in this suit.

Q. And on that assurance you took the shells?

A. And on that assurance I took the shells, and I had them endorse the bill of lading to me.

88 Cross-examination.

By Mr. Barclay:

I have a very extensive business throughout the west, and know how these shells are gathered. I have heard the description of this Little River, here in court. These shells are deposited on the bed of the stream and are generally gathered up by people who wade out where it is shallow, or use a series of hooks in case the water is deep enough for them to use a boat; there are various ways to get shells. They are dug up from the bottom of the bed and if it is shallow enough to wade diggers go without a boat, otherwise they use a small boat. Shells are not always found in shallow streams; they are in the Mississippi River, as well as in small rivers. They are not found more in small rivers; the best shells that were ever discovered are in the Mississippi. The best shell that comes out of the river is the Nigger-head shell in the Mississippi River. There are good shells in Arkansas. Those in the Little River district are a very poor quality of shell. We consider them the poorest shell that we use for buttons, the three-ridge. During 1913 and 1914, I should say the value of the Nigger-head shell was about twenty-five dollars a ton. That would be the figure for such shells delivered at Muscatine. The Little River shells were about $13.50 a ton, delivered Muscatine.

When I sent Figg down there to see about Mr. Blake it was not for the purpose of ascertaining where these shells were coming from, because we were not interested. That question had never been raised.

Mr. Barclay:

Q. You knew as a business man that you had no right to take shells belonging to a private party?

A. I didn't know where the shells came from.

Mr. Hocker: That is objected to; we don't know that.

The Court: He asks if he does know. Answer the question.

Mr. Barclay:

Q. Did you as a business man know if these shells belonged to a private party you had no right to them?

A. I didn't know where the shells came from.

Q. That was not my question.

(Previous question read)

A. Well—our knowledge at that time was that the shells were on tangible property.

Q. My question——

A. (Continuing:) Regardless of where they may be found.

89 Q. My question was a very simple question.

Mr. Hocker: I submit that is an answer.

Mr. Barclay: I want you to answer me as a business man, apart from the question of law. Did you not know that if those shells came from private property, where there was a private owner, that you had no right to them?

A. I did not know it, no, sir.

Q. You didn't know that?

A. No, sir.

Q. You would think that if they belonged to a private party, or were found in a private stream where the owner owned the bed of the stream and both sides of the stream, you would still have a right to take them?

A. I would have a right to find them in any waters of this United States without regard to property or——

Q. That is the idea on which your Company acts in buying shells, that they can buy them wherever they come from, without regard to ownership?

A. That has been the practice of every button manufacturer in this country.

Q. I am talking of your practice: Has that been your practice?

A. It has been my practice to buy shells wherever they are offered without inquiring as to where they come from.

Q. Or what river they come from, not knowing or caring from whose property they come?

Mr. Hoffman: That is two questions.

Mr. Barclay: I am asking this witness a question.

Q. Is it not a fact that you made no inquiry whatever as to the title of the place from which these shells were brought?

A. We never had occasion and we never did make any inquiry.

Q. You never made any inquiry?

A. No, sir.

Q. And you didn't care where they came from, is not that a fact; you didn't care what property this came from?

The Court (to Mr. Barclay): Don't ask him whether he cared [of] not.

By Mr. Barclay:

Q. You made no inquiry? Did you learn afterwards that this property belonged to the St. Louis Union Trust Company and the

Lumber Company, from which these shells were taken; did you not learn that?

90 A. Through their correspondents; said they owned it.

Q. That was the first time you heard of it?

A. Yes, sir.

Q. You never made any inquiry at any time as to who was the owner of that property: Is that right?

A. No, sir.

Q. The beginning of your dealings with Mr. Blake was the purchase of his car that came up there, sent from Wardell, is that right; and then he afterwards asked you to advance him the money to carry on the shell purchases down there, is that right?

A. Yes, sir.

Q. And you then furnished him that money?

A. I sent him checks in advance.

Q. In advance, for the purpose of having him get these shells out and sending to you to buy there at Muscatine?

A. He used the money to buy the shells.

Q. That is what you sent it for, to have him carry on this shell business, was it not?

A. I gave him the money to enable him to buy the shells, yes.

Q. And that was your purpose that he should—having supervision of the digging of these shells down in Little River District, you knew that?

A. I don't know anything about what he did, only buy the shells and loaded them on to the cars. I had nothing to do with it until the shells were on the cars.

Q. My question now relates to your purpose; I am asking your intention and purpose: Was it not your purpose in sending him this money by way of loan, to have him arrange to have these shells taken out and sent to you at Muscatine?

A. I sent him the money to enable him to do this.

Q. I am asking you now your intention: Your intention in sending him that money was to have him carry on this shell business down there for the purpose of sending them up to you, was it not?

A. That is what he used the money for.

Q. That is what you sent it for?

A. Sure; so he could buy the shells.

Q. Now it is all right. Your purpose was to have him carry on this business——

Mr. Hoffman: That is not what he said.

The Court: Let him answer.

Mr. Barclay: I am getting at the object he had in view.

The Court: I have ruled that he shall answer.

(Previous question read.)

A. Yes, sir.

The Court: He says yes.

91 By Mr. Barclay:

Q. You knew that Mr. Blake was going to make a deposit in that local bank which Mr. Fields was the cashier of; your checks showed that, didn't they?

A. I don't know anything about what the checks show.

Q. You have seen the checks when they came back?

A. Did I?

Q. Yes.

A. You are presuming a lot for a business man.

Q. I am not stating it; I am asking you.

A. No, I never saw the checks. I sign the checks.

Q. Don't you know that the purpose of this deposit of the money that you sent, that the intention was to have it deposited in the local bank, against which Mr. Blake drew to pay these parties who were employed?

A. I don't know anything about that.

Q. You know enough about business to know that in such a place as this it would take quite a number of people to dig these shells?

A. I don't know how many were digging.

Q. Do you know how many dug in this Little River district within the confines of the property of these plaintiffs?

A. I do not.

Q. Ordinarily, you know enough about the business to know what sort of a group of people would be engaged in such an enterprise as this, don't you; how many people would probably be employed?

A. I don't know.

Q. Don't you know from the knowledge that Mr. Figg has given you about the case?

A. No, sir.

Q. Do you know whether they had one man, or ten or fifty men?

A. No, sir.

Q. You don't know how many men?

A. No.

Q. Did Mr. Blake report that to you?

A. He had no occasion to report it.

Q. Did he not report the number of people who were engaged there?

A. He did not.

Q. Then you left it altogether to his discretion?

A. Absolutely.

Q. And you simply furnished him the money and he employed whoever he pleased, as many as he pleased, and the details were carried out by him?

A. I had nothing to do with it only give him the money and have him pay for the shells.

Q. I would like to have your answer.

The Court: He has answered.

Mr. Hocker: He has answered the question.

92 By Mr. Barclay:

Q. Have you ever been down at this place at all?

A. No, sir.

Q. You have never been there, but you know from the description given by Mr. Figg what sort of a place it is, don't you?

A. I do now.

Q. It is a swampy district with a very small town, Wardell. These shipments were all from Wardell, were they not?

A. I believe they were; I am not sure.

Q. They were billed from this very little town near by; Now recurring to Mr. Blake's check for $8.50 instead of $9.00 a ton: Check was sent to him for $8.50 in order that he might show it to the diggers to let them understand that he was getting $8.50 a ton?

A. That was his explanation.

Q. That is the check that you sent at his request?

A. Yes, sir.

Q. $8.50 a ton instead of $9.00?

A. Yes, sir.

Q. You knew the price was $9.00, did you not?

A. Yes, but he got another check at the same time for fifty cents.

Q. He got a separate check for the difference?

A. Yes; which made a total of $9.00 a ton.

Q. So he could show the check for $8.50 to the diggers?

A. Yes, sir.

Q. In order to let them understand that the price was $8.50?

A. That is his explanation.

Q. That is because he was paying these diggers according to the price that you were paying him, is not that right?

A. No, sir.

Q. What is that?

A. No, sir.

Q. How did that figure with the charges——

A. The total amount I paid him figured nine dollars a ton. I sent him two separate checks at his request, and I have already explained that.

Q. I understand, but was that not because he was paying these boys or diggers upon the basis they understood he was being paid by you; was not that the reason why that was done?

A. I will let him explain that. I have told you the explanation that he gave me.

Q. But don't you understand, and did you not then understand that the reason why that was done was because the payment that was made to the diggers or the boys was in proportion to the payment that you made to him for the work?

A. Yes; in plain English, he wanted to hornswoggle them fifty cents. That is plain English.

Q. I understand that, and you sent the checks accordingly, did you not; you sent the checks as per his request?

93 A. Yes, I did.

Q. But here is my point: Did you or did you not know

that the wages, or the prices that were paid these diggers that took the mussels out of the bed of the river, was to be proportionate to the payment he was receiving from you? Did you not know that?

A. I didn't know anything about that.

Q. You didn't know that. What do you call that process in your business of furnishing a man means ahead of the work, by which he can carry on a business like that; have you any word for that?

A. I would call that loaning him money.

Q. Don't they call that staking, as they do in the mining business?

A. I never did.

Q. Has that not been called among these diggers as "staking" a man?

A. It may be among a certain class.

Q. Have you never heard that word in your business, "staking" a man, furnishing means by which to employ diggers to get out shells?

A. I don't know; I don't think so.

Q. There is no such word applying to that transaction?

A. Not as far as I am concerned.

Q. You regarded it simply as a loan to him to carry on that business, is that right?

A. Yes, sir.

Q. I suppose you claim no interest, estate, right, title or anything else in these lands themselves, at any time?

A. No, sir.

W. A. BLAKE, a witness of lawful age, being duly sworn and examined, testified, in substance, on behalf of the defendants, as follows:

Direct examination.

By Mr. Hocker:

My name is W. A. Blake; I live at Parkin, Cross County, Arkansas. In 1913 and 1914 I was living in Wardell, Pemiscot County, Missouri, and I believe I lived there about eleven or twelve years. I know the Little River, and had known it during the years that I lived there. I have done business musseling, getting mussels out of the streams and selling them. That had been an industry down in that section where I lived near Wardell. That business was carried on, that is, taking mussels out of the rivers, for something like two years after the market price was established; I believe it began in 1912 and '13, and a few dug in 1914, as well as I remember. I engaged in that business and begun about 1907, I guess, when I first commenced digging a few of them as a sample. I did not dispose of any; I couldn't sell them. I believe that it was 1912, when I first began to sell them. I had not sold shells to others,
94 beside the McKee & Bliven Button Company, before the shipment in the summer of 1913; I couldn't sell them. There was no market for them.

I was working at a box factory and they had a Bradstreets's and Dun's bank directory in the office, and at times when I had leisure I would go to that directory and get the names of button factories out of it; and this is the way I got into communication with the McKee & Bliven Button Company. In that way I got the name of McKee & Bliven. I had no acquaintance with them up to that time. I first shipped them a sack of shells but some of the Company wrote that they did not get any shells, and I then sent them a box. They told me they couldn't handle them at that time; that was possibly in 1908, but they said later on they can. I believe it was 1912 when Mr. Prewitt came in there; he was digging for Soper. That was another button man. There was another man there named Eigert who got out a few shells that I think he sent to Cairo.

The next year I took the matter up again with McKee & Bliven; I started to dig the shells on the first day of July, 1913, and a man named Rebhehn was digging. I was digging and didn't know what I was going to do with my shells, but Mr. Rehbehn wouldn't buy my shells from some cause or other. And another man, Lee Cheek, and Ollie, were digging. They were brothers. He offered them seven dollars a ton for their shells, and they wanted to know if I couldn't do better. I says, "Mr. McKee said sometime past that they could handle these shells." So he told me to write. I wrote and asked them what they could give. They said they wanted a sample and I sent them a sample. Then they said they would not set no price, but for me to find out what these diggers would take and I could notify them and if they could buy the shells at the diggers' price they would do so, and if not there would be nothing more to it. I went and seen these fellows and they said they wanted eight dollars a ton. I said, "You are going to have to wait until the shells are shipped to get the money." They said if they could get that money it would be possibly three weeks. Rehbehn was paying seven and they wanted eight dollars. There was not enough dug at the time for a car-load and I wrote Mr. McKee, but I kind of sprung it on him. I told him that we could put them in the car for $8.50. The boys said eight dollars. McKee said if the shells were like the samples that he would give me nine dollars on board the car at Wardell. So I told the boys that we could get $8.50 for them and we started in digging and finished up the car.

95 I got nine dollars in two checks. I had asked him to give that in two checks on account of the boys. I told them that we were getting $8.50. Mr. McKee gave me nine dollars a ton for the shells. He did not give me anything else besides nine dollars a ton for the shells. That is true of all the shipments that were made to him by me. I myself dug something between six and seven tons, I think. Of the first carload Lee Cheek and Ollie Cheek dug a little bit over two-thirds. They had a little more, each one of them, than I had. They owned a larger interest in the first carload than I did. Outside of those six or seven tons that I dug myself I bought the balance of those shells from other people. I bought from Lee and Ollie; I bought from old uncle John Miller, and young John Miller. From anybody who had shells to sell I bought them,

if I could get them. I did not pay any attention to where those shells came from that I bought. The shells were put in the car at Wardell; delivered there by the people who sold them to me. They were brought in wagons; and these men had to scoop them back in the car. They had to deliver them in the car, and whenever I got the money for this car I would go back and pay them. I would pay the men for the shells. I did not know and did not concern myself about where the shells came from; that is to say, from whose land or from what part of the stream they came from. I never heard anybody ever make any objections, either to me or to anybody else down there, about taking shells out of the Little River at any time. I never had any complaint made to me by any land owners; and I never heard of any of the land owners ever making complaints to others. There were other people buying shells, there besides me; and I guess they were handling shells, and other people buying them besides McKee & Bliven. Rehbehn bought some shells; he said he was not buying them for McKee & Bliven.

Little River is changed wonderful since that time we were getting shells there. It was just a low swamp first on the one side and then on the other, with a little meandering channel, small meandering channel, probably fifty or a hundred feet. It meandered diagonally from the northeast to the southwest across this territory by maybe two townships. Quite a good many logs were floated down it. At Wardell there was a saw-mill; two that I know of. The river was the only way of travel for a good part of the time, in boats. The roads in that country was so poor that you couldn't go with wagons. During wet weather the condition of the roads was bad; muddy.

People would go from place to place in little dugouts. A
96 "dugout" is a log split in two and carved out like a half watermelon. Things were carried in the dugouts, groceries and supplies of all kinds; and occasionally make a trip across the swamp over to the mills; take milk or corn in the dugout and go across to a place where they got a farmer to haul their stuff to Kennett. I knew J. T. Warren, the keeper of this land. I know of his hauling shells from off this land, from along the river, that other people had dug, principally for Rehbehn. I never knew of Warren's taking any of these shells out of the river himself; but he would rent out his teams for somebody to haul them from this land. His stepson and nephew, and one of the boys, I remember, that worked for him, drove the teams. Warren never objected to my taking shells from off the land, or out of the stream; and I never heard of him objecting to anybody else. The shells came out of the channel of the stream, out of the water, where the channel of the water was. It was too snaggy to use drags to get shells. The shells were alive; they are of *not* value to the button industry if they have been dead for any length of time. We catch live mussels and cook the meat out of them, and ship the shells without the meat.

Mussels move about. I never just watched them, but I could see their tracks. I believe I have seen one or two, with a very thin shell, floating in the water. I thought it was a mussel shell, but they disappeared, so it must have been a live——

Some shells came from further than eight or ten miles away from Wardell, that I shipped up north to McKee & Bliven; it must have been twenty miles farther up the river. They were hauled in a wagon from what we call Cove's land to Kennett, and put in a car there. I wouldn't be able to say how many shells I shipped to McKee & Bliven, off from the land claimed by the Trust Company or the Lumber Company; I have no idea about that; or from the land claimed by anybody else. I know this stream from Morehouse, Missouri, to the mouth; I expect it is two hundred miles. Morehouse is in the neighborhood of fifty miles, I believe, from Wardell, by the stream. This river is about two hundred miles in length; that much, if not more.

Cross-examination.

By Mr. Wallace:

Warren was a farmer; that was his main business, his regular business; he had horses and teams; and at times, whenever he wanted to, he would rent those horses and teams to anyone
97 who would pay for them, for any purpose they desired. I never saw Warren dig or haul any shells himself.

I am not employed by the McKee & Bliven Button Company at the present time; but I have been in their service since the other trial of this case. In 1916 I commenced to work for that company on the 27th day of May and I worked until the first day of December. I was buying mussel shells. At the present time, I am not employed by the Company. When Mr. Figg went to Wardell the first time, in 1913, he showed me some shells that were good and showed me some shells that were not good. We were not on the river at all. We went out to the car that was loaded there; I don't know but what the car had just moved out, but there were some shells on the ground that fell out. Mr. Figg was showing me the difference in the good shells and the bad ones. He criticised the bad ones. I testified in this case at the other trial in Iowa. I have recently read my testimony given up there.

Mr. Wallace:

Q. I wish you would state to the Court and this jury, in substance, or as nearly as you can, what you stated up there about asking Mr Warren in 1912, or thereabouts, for a lease of Little River for these shells. Just state now as nearly as you can what took place between you and Mr. Warren about that lease of Little River.

A. I don't remember just exactly how it came up, but I knew there was some money in shells. I had been on the Wabash and seen what they was doing up there, and when I got back down to Wardell I wanted to go to digging shells; I wanted to get control of the banks to keep opposition——

Q. Control of the banks?

A. Yes; and I asked Mr. Warren if he could get a lease of the river, or of the banks, was the way I said, as well as I remember. I knew

the banks was what I was figuring on to keep other fellows from coming in there and cooking out. He said it did not amount to anything. I believed that would be all right. I said, "I believe the shells is worth more in that river than the timber is." He says, "You are going wild," but he said he would see about it.

Q. About what?

A. About getting control of the bank. He was already agent but I wanted to get it in——

Q. Go ahead and finish.

A. Well, he was aiming to go to St. Louis in a short time and he would talk about it. I seen him later and he had not gone yet, but he said he would write about it. About that time Mr.
98 Rehbehn came in there and set up a mussel camp right close to mine on John Sawyer's land. I had my camp on Sawyer's land and Rehbehn up about fifty or hundred yards. Rehbehn asked how he would like to have a contract about hauling shells, so he told me. I asked if he was going to. He said he did not know. He said he did not think the shells would amount to anything. He said, "I have a contract for hauling shells for Mr. Rehbehn."

Q. For Mr. Rehbehn?

A. Yes, sir.

Q. Mr. Blake, I will ask you also if in the other trial of this case you didn't say this:

"I had been on the Wabash and I seen what there was in shells, and I had seen these shells and I just wanted to go into business to get to handle them myself, and I went to Mr Warren and I asked him if he could get a lease of the river and he said he didn't know. I said, 'If you can get a lease of this river, I will handle the shells and divide the profits with you.' Why he said he didn't think it would amount to anything. I told him in my estimation that the shells in the river there would amount to as much as the timber on the bank, and he began to laugh at me, and finally he said he thought he would be to the St. Louis Trust Company in a short time, and the next time I came to see him he didn't know just exactly when he would go; he just kept putting me off and finally I asked him again, and he said it would be impossible to get control of the water."

Mr. Hocker (to Mr. Wallace): Go on.

Mr. Wallace:

Q. You remember to have testified that up there, do you not?

A. I believe that is just about the way——

Mr. Hocker (to Mr. Wallace): Go ahead and finish it.

Mr. Wallace:

Q. I will ask you also if you didn't in that answer say this:

"Then I wanted to know what about the chances for us to get the banks. I said, 'If we can get hold of these here banks there is only just a few places that other fellows could put up cook houses that wouldn't be on that ground.' So Mr. Rehbehn then came along

while I was trying to get Mr. Warren to get the lease and stood up right there, and we were talking about shells, and Mr. Warren's teams went to hauling shells and I just dropped it."

You never got the lease from Warren?

A. No, sir.

99 Q. He told you he couldn't get it after he asked for it?

A. That it would be impossible to get the water.

Q. That it would be impossible to get control of the water: Is not that correct?

A. Yes, sir.

Q. When was that?

A. That was about 1912.

Q. That was before the McKee & Bliven Button Company ever got a car from down there, wasn't it?

A. Yes, I expect it was. I won't be positive.

Q. What were Mr. Warren's duties down there, do you know; do you know what he was employed to do?

A. He claimed that he was looking after that land for the outside with his farming and log hauling and other team work. He seen to his own work and also seen to this land. Occasionally he would make a trip down the river to see whether any timber had been cut or anything of that sort.

Mr. Hocker:

Q. You mean the St. Louis Union Trust Company's land and the Lumber Company's?

A. It is all the same, as I understand it.

Mr. Wallace:

Q. Up and down from Wardell?

A. Yes, sir.

Q. He was the care-taker of the timber down there, to keep people from cutting the timber and stealing it?

A. He looked after it.

Q. He actually kept people from doing that?

A. They cut it.

A. As far as he could he looked after the timber?

A. Yes; he was looking around.

Q. You say Mr. Rehbehn and other people got shells down there. Do you know anything about the suits that were instituted against the Ontario Button Company for getting shells, or against Mr. Rehbehn or any action taken against those people?

A. No, sir, I don't know. There was a piece in the paper from the Union Trust Company; they brought suit against the Frisco Railroad.

Q. For these shells?

A. For carrying off stolen property, or something to that effect. I don't know just exactly.

Q. When was that?

Mr. Hocker: That is objected to as being clear outside of this issue.

Mr. Wallace:

Q. In accounting with the boys down there for digging the shells, you accounted to them on a basis of that fifty cent check you would get; they knew what you got for the shells represented by the little check——

A. They never seen the little check.

Q. You told them that was the case; you settled with them on that basis?

Mr. Hocker (to Mr. Wallace): What basis?

Mr. Wallace: $8.50 a ton.

A. I paid them $8.50, these boys; and the others I paid $8.00, other shells that I bought. Some I bought for less.

To gather a ton of these mussel shells and take the meat out— I believe we could have done it in two days; it might have taken a little longer, but there was men there that dug four to six hundred pounds a day.

I do not have in my possession any of the letters or telegrams received from McKee & Bliven during 1913 and 1914. I received letters; I don't know whether I ever received any telegrams. I don't remember. I can't tell you where they are. I don't remember what has become of them. It might be that there are some of them down home, but I can't say positively where they are.

Redirect examination.

By Mr. Hocker:

I never had anybody working for wages; I paid the diggers for the shells that they brought in to me.

During the time I was down there this river was fished in and hunted over all the time during the seasons, by anybody who wanted to. No one ever complained or objected to that before this suit; I believe there was a little objection put up after this suit was started.

JAMES FIGG a witness of lawful age, being sworn and examined testified, in substance, on behalf of the defendants as follows:

Direct examination.

By Mr. Hocker:

I live in Muscatine, Iowa; I buy shells; I work for McKee & Bliven Button Company, and have been working for them about six years, I think. I was working for them in 1913 and 1914; I generally went out and bought shells around over the country in different places, all over the country that shells come from. I had

been in the business before that, as a broker, and had bough
101 and sold shells as a broker, for probably fifteen or sixteen
years. I know shells pretty well; the different varieties and
value of shells for commercial purposes.

I was sent down to Wardell to see what kind of a fellow Blake was
how reliable he was. Mr. McKee asked me to go. I made inquiries
about Blake; I saw Blake a few minutes; I don't think I was with
him over fifteen or twenty minutes. I did not let him know the
purpose I had in mind when I came, and did not undertake to trans-
act any business with him for the Company. I went down to find
out the type of man he was; his financial responsibility, and moral
character, from a business standpoint. This, I found out, and gave
a favorable report about him, and so reported to Mr. McKee. That
was the extent of my connection with the business transactions that
were had by the Company with him. I made none myself. I didn't
know what relations the Company had in mind making with him.

Mussels stay in the water. The live shell is of commercial value;
dead ones are of no value to speak of, because they have no life in
them, as the shell is brittle and chalky and you cannot use them for
making buttons. Mussels move about on the bed of the stream; they
crawl around on the bottom of the river. I have seen them float.
Just how much they move from place to place I couldn't say. I have
seen their trail for quite a long distance. They don't fasten to noth-
ing; they are free to move about at all times. They do not fasten to-
gether like oysters. You do not find mussels grown together like
oysters. They do not fasten themselves together at all. They are
usually in what is sometimes called a bed; sometimes thicker in one
place than another. I guess I have bought shells all over the coun-
try; that is, tributary to the Mississippi River. I never heard of any
land owners objecting or making complaints of trespass for digging
shells out of any of the streams in that section. As far as I know in
my experience, or in the experience of others, this is the first case.
The laboring class of people are the people who usually dig these
shells, or gather them; people that live in little communities like
Wardell, fishermen and men of that type.

The kind of shells that came from Little River are the three
ridges, principally. They are a cheap quality of shell; not the best.

Cross-examination.

By Mr. Barclay:

The expense books that were produced here are my accounts.
They relate to my trips down there, and show my ex-
102 penses generally. I was in there, I believe, on the 18th of
August, if I remember right—19th of August, the first time.

Mr. Barclay: Prior to that time you had been sent down by the
Button Company to investigate Mr. Blake?

A. I believe they sent me word or wired me at Vincennes, Indi-
ana, and I went from Vincennes.

Q. The object of that was to ascertain what sort of a man he was, and whether he could be trusted to make a loan to, to carry on this shell business?

A. They asked me to go down and find out what kind of a fellow Blake was, and I went.

Q. You understood the object of that; they told you why you were sent there?

A. To see how responsible he was, yes.

Q. To see whether he was a man safe to make a loan to for the purpose of carrying on this shell business?

A. That was their business.

Q. Did you not understand what you were going there for?

A. No; all I went there for was to see what kind of a fellow he was, how reliable he was.

Q. In what respect?

A. His ability as an honest man, and upright.

Q. Whether he knew how to dig shells?

A. No, sir.

Q. You knew he had already sent a load of shells?

A. How?

Q. You knew he had already sent a load of shells?

A. I did not.

Q. You didn't?

A. No, sir.

Q. Was not that first carload of shells billed through your account to the Company?

A. Well, I don't know a thing about the shell deal down there, not a thing; the first car or any of them; I had nothing to do with it.

Q. You said that you didn't know that he had shipped a car before?

A. I didn't.

Q. Did you not say that?

A. I didn't know he shipped a car, no.

Q. That is what I understood you to say, that you did not know that he had already shipped a car, at the time you went down?

A. I didn't know, no.

Q. I ask you, then, in connection with that, was not the car he had in fact ship before that time, billed through you in the business of your Button Company; charged to you?

A. No.

Q. Are you sure?

A. Why, certainly I am sure.

Q. I ask your attention to an account that has been furnished here by the defendants: "James Figg, shell money advanced," page 125: An item on the 24th of July: "W. A. Blake, $1.08:" What does that mean (handling paper to witness).

A. I don't know anything about it.

Q. Look at it. That is one of your accounts, is it not, for shell money advanced?

A. It is not my account. The bookkeeper will have to explain that to you.

Q. I am asking you about the transaction.
A. I don't know a thing about it.
Q. Don't you ever see your account, or know what your account is with the Company?
A. Not this account, I never have.
Q. Don't you look over the account where you are charged with shell money advanced to you? Are you not furnished with a copy of the items of account made by the Company against you for shell money advanced?
A. I don't know as I get a copy of it.
Q. Don't you ever see your own account with the Company?
A. Well, now, I don't know as I do.
Q. How is your account with the Company kept; you have an expense account and you turn that in to get credit for that, I suppose don't you?
A. Certainly.
Q. There are other moneys advanced to you besides that, are there not in the course of the business?
A. Yes, sir.
Q. Is not that the very account that is intended for the purpose of showing what money is advanced to you for the purpose of buying shells?
A. Not this account.
Q. What is that for?
A. You will have to ask the bookkeeper.
Q. What does it say; what does it purport to be? It purports to be an account of money advanced to you for the shell business, does it not?
A. Yes, it does.
Q. Look at that account. Is there not an item there, 24th of July, 1913, of the amount I just mentioned—$241.08—charged to you for shell money advanced. Is not that there?
A. On the 24th?
Q. Yes; July, 1913.
A. How much did you say, $147.80?
Q. $241.08, July 24th.
A. Yes, that is what it says here.
Q. Is that right?
A. That shows on this slip, but I have nothing to do with that slip.
Q. You never heard about that?
A. No, sir.
104 Q. How did that money happen to be charged to your account?
A. Ask the bookkeeper when he gets up here.
Q. In other words, you don't know?
A. How?
Q. You don't know a thing about it?
A. I don't know a thing about it, no, sir.
Q. Do you say that you never agreed, or thought until this o

casion here, that you had been charged with money advanced to Blake on this shell account, until I showed you this account?

A. No, sir, there never was any charged to me that I know of.

Q. When you were down there in August the digging out of those shells was quite active, wasn't it?

A. Yes, they were getting out quite a few shells.

Q. What was the stage of the water at that time?

A. Well, if I remember right, the water was not very high. Of course, I didn't know what the stage of the water was, you know.

Q. How did it look when you saw it; could they wade across the stream?

A. Well, no; what I seen working they were taking them out with boats.

Q. Look at this a moment (indicating map): This is Wardell, you understand?

A. Yes, sir.

Q. That is the place where the Lumber Company's property is, and Wardell, you know, is in the center of that?

A. Yes.

Q. Did that look something like the meandering stream; the general course is very crooked, is it not?

A. I couldn't say exactly, because I am not familiar enough.

Q. The course of the Little River is very crooked?

A. Well, yes; apparently.

Q. It was at that time?

A. Yes, sir.

Q. In some places there was deep enough water for boats and in other places the men could wade and dig out these mussels?

A. I suppose that was the way. I don't remember.

Q. Did you not see a lot of mussels taken out by the men wading in the water, without getting into boats?

A. I was not there——

Q. How long were you there?

A. I was not in Wardell over an hour or hour and a half, all told.

Q. Did you not go out?

A. I seen some shells at the car.

Q. What did you do to investigate Mr. Blake?

105 A. I didn't investigate that place; I went there to investigate Blake.

Q. What did you do to investigate Blake?

A. I just went to the men along there and found out what kind of a fellow he was.

Q. What men?

A. I can't give any of their names, because I didn't know them.

Q. Whom did you talk to; did you talk to the bank man down at Pascola?

A. No.

Q. Did you talk to Mr. Fields; do you know Mr. Fields, a bank man?

A. No.

Q. Was there an arrangement made while you were there for a deposit of money on his behalf?

A. No, sir.

Q. Nothing of that sort?

A. No.

Q. You spent an hour there?

A. I got up above somewhere and drove down the river twenty-five or thirty miles, I should judge, in a car.

Q. How many men did you see?

A. I expect probably—I couldn't say; probably a dozen or such a matter.

Q. What did you ask them?

A. What kind of a fellow Blake was.

Q. In respect to what?

A. Whether he was an honest fellow or not; whether he was honest, and one thing and another.

Q. Were these the diggers of the mussels that you asked?

A. Some of them were diggers. During the time when I was down there, there was only one fellow I ran into that I knowed; that was a fellow named Rehbehn.

Q. You knew him before?

A. Yes, I knew him before.

Q. He had been a digger and had sent shells up to Muscatine?

A. I don't know whether he had ever sent shells to Muscatine or not, but of course he did other places.

Q. But you made no inquiry about who owned this River, I suppose?

A. No, sir.

Q. You didn't care who owned it?

A. That was none of my business.

Q. You were not sent there to investigate that?

A. No.

Q. Was there any camp for these men who were digging at the time?

A. How is that?

Q. Was there any camp for these men who were digging at the time, in which these men took their meals, and so forth, during the digging?

A. Camps?

106 Q. Yes.

A. I don't believe that I seen any.

Q. You didn't stay there long enough to see much of anything?

A. I was not there very much. I started down above and made my investigation after driving down, and took my train out in another direction.

Q. How long a time altogether?

A. That I was in there?

Q. Yes.

A. I started in at the upper end, I think sometime in the forenoon, and we left there along about three o'clock in the afternoon.

Q. At what point did you take the train?

A. At Wardell.

Q. The way in which these are usually dug is from the bed of the river, is it not?

A. Yes, sir.

Q. In some shape or other, either by the men wading in, or a little boat which hooks them out like oysters?

A. No; lots of them has like four big fish hooks tied together; they put three or four of them on a string and drag behind the boat, and the mussel catches on them, and they pull them up in the boat.

Q. Are these the mussels that frequently contain the pure water pearls?

A. The fresh water pearls.

Q. Yes.

A. Yes.

Q. I believe you said that you made no attempt to investigate who was the owner of this property, or anything of that sort?

A. No, sir, I did not.

Q. You were not sent for that purpose.

At this point, the Court having admonished the jurors as to their proper conduct in connection with the case, a recess was declared. After recess, proceedings were resumed as follows:

Mr. Barclay: During the recess Mr. Figg has looked up the entries in this little book called No. 10.

Q. Is that the 19th or 18th of December?

A. It was the 19th. I told you before.

Q. I thought you did, but I want to be sure about it.

A. This is the 19th of August (indicating on book).

Q. That is the one you spoke of before?

A. Yes, sir.

Q. The only other one of these expense books produced by the defendants is the one that you have in your hand; it has no number on the outside: Do you know what it ought to be?

A. No, I don't.

Q. It is the account of December, that same year.

107 A. Yes, it is the account of December, that same year.

Q. Tell the jury what that expense account describes of your connection with the Little River business.

A. Well, I went down at this time of the year to look over the river and see as to how many shells was in it, etc.

Q. For the purpose of investigating whether the shell business could be continued there, is that right?

A. No; I wanted to see how plentiful the shells were.

Q. How what?

A. How plentiful they were in there; to see how many shells there were in the river.

Q. To estimate the number of shells?

A. Yes, sir.

Q. How long were you there this last time?

A. It was not done, practically, for Wardell. It was done—there was a lot of low land in the river below a swamp some place in there. We took a launch from Wardell to start to see this other way below.

Q. This was another location, down the river?

A. Yes, that is what we went to look after.

Q. With a view of investigating the shell business down there as——

A. We did down below, but we did not above.

Q. Your investigation this time was to see whether the shell business could be prosecuted with profit below?

A. To see if there was not a better variety of shells below than there was there.

Q. I want to ask your attention to another item in your shell money advance account, the account of James Figg, in which Blake is charged with $3,500.00, on the 8th of August, 1913: You see the charge against you in your shell account, $3,500.00 to Blake's account?

A. It is as I said before; this particular account I know nothing about.

Q. Do you know anything of the transaction?

A. I know nothing of the transaction; nothing whatever.

Q. That $3,500.00 was advanced through your account to Blake on the 8th of August, 1918?

A. I know nothing about it.

The Court: He says he knows absolutely nothing about it

A. I absolutely know nothing about the shell buying at Wardell at all.

Mr. Barclay:

Q. Was that the amount of the loan that was made by the Button Company to Blake?

108 A. I don't know.

The Court: He said he does not know anything about it.

Mr. Barclay: Then we don't have to bother him.

Redirect examination.

By Mr. Hocker:

Q. Besides taking these shells out with prongs, or a pronged instrument like a fork, or by hand, or by tongs in deep water, how are the mussels caught?

A. Well, they are caught with such hooks as that (indicating) only they put four on instead of three on a string like that and then they are put on to a long piece of gas pipe; they generally put on about one hundred and fifty hooks to what they call a bar. Then they throw them down into the river and the boat pulls along on the bottom of the river like this (illustrating) and the mussels get clamped onto these prongs there and held fast, and then they lift them up in the boat and pick them off.

Q. Sometimes you get one on each prong, do you?
A. Sometimes when they are plentiful they get them on every prong.
Q. That is the way they fish in deep water?
A. Yes, deep water, or even three or four feet water.
Q. How do they fasten on there, clamp on?
A. They clamp right on here (indicating).

Recross examination.

By Mr. Barclay:

Q. Was any of that sort of fishing done in Little River?
A. I don't know whether it——
Q. Was it deep enough for that?
A. I think there were plenty of places that were deep enough.
Q. Around Wardell?
A. It don't require deep water to work this.

The Court:

Q. As a matter of fact, the clam or mussel that is laying in the water and feeding lays with the shell open, and when this touches the sensitive part of the body itself it clamps up?
A. That is it.

The Court: I think we understand about that.

Mr. Hoffman:

Q. What do you call that?
A. Crowfoot.

109 G. H. OHLSEN, a witness of lawful age, being sworn and examined, testified, in substance, on behalf of the defendants as follows:

Direct examination:

By Mr. Hocker:

I live in Muscatine, Iowa, and am a bookkeeper for the McKee & Bliven Button Company, and I was in 1913 and 1914.

Q. This account came out of your loose-leaf ledger, did it (see Plaintiff's Exhibit No. 16)?
A. Yes, sir.
Q. It is the account showing Mr. Blake's transactions?
A. Yes, sir.
Q. In the first account you put it under the name of James Figg: Why did you do that?
A. Because I didn't know how Mr. Blake was going to buy shells for us, and I didn't want to open up a new account for every one of these shell men that came on, so I put it here all in Mr. Figg's

account, because Mr. Figg was buying most of our shells and if anything about shells came up I could look in his account. I can show a counter-entry on the credit side showing where they are balanced off and would not affect his account at all.

Q. There are a number of other people in the account besides Blake?

A. Yes, sir, and it would really not affect the account at all. I just started in January, 1913, and never had much experience in bookkeeping, and I put it in that account. There was no one to show me.

Q. You put various other persons from whom you——

A. All about shells.

Q. Is there anything there showing $3,500.00 for Mr. Blake?

A. No, sir.

Q. What is that?

A. There is ditto marks there; that is for the cashbook page. These ditto marks are under "C. B."

Q. That has nothing to do with Blake?

A. No, sir.

Q. Only those figures opposite Blake's name, or King's name, or Morgan's name, have anything to do with the individual's account?

A. Yes; in other words, the account is subdivided that way. It is Blake's account under that heading.

Q. This $3,500.00 has nothing to do with Blake?

A. This $3,500.00 has nothing to do with Blake at all.

Q. Was Blake's account balanced and closed?

A. Yes, Blake's account was balanced and closed.

110 Cross-examination.

By Mr. Barclay:

Q. What is this item on July 24, in the account of "James Figg, shell money advanced" page 125, this item of $241.08? I see you refer to folio 153, page 5; Where is that folio?

A. Has it marked opposite it there "W. A. Blake?"

[A.] Yes, W. A. Blake, folio 153, page 5: Where is that folio?

A. That is the cash book folio.

Q. Where is the book?

A. Well, that would not give you any more information than you have there. You haven't the original check. The cash book is just the entries of the check stubs, and then posted to whatever account it should go to. So the cash book would not give you any more information that you have there. The cash book means——

Mr. Hocker (to the witness): He asks if the cash book is here.

A. No; I haven't got it.

Mr. Barclay:

Q. My question is, this refers to folio 153, page 5: Where is that document, the original entry from which this is posted; where is it?

A. It is in the office there; the cash book is in the office. May I see that, please (indicating ledger sheet)?

Q. Certainly.

A. Which item do you refer to?

Q. The first item.

A. 153, that is——

Q. $241.08 is the item of the account.

A. Yes, $241.08.

Q. But the folio is 153, page 5: Where is that?

A. That is the cash book.

Q. That is the original entry from which this posting is made?

A. It really is not the original, because the check is the original.

Q. I understand, but you posted from the folio?

A. Yes, sir.

Q. And therefore, as a bookkeeper, you put the reference to which your posting refers?

A. Yes, sir.

Q. Where is that original entry from which you——

Mr. Hocker: He said it is in Muscatine.

Mr. Barclay:

Q. Why did you not bring it?

A. I did not think it was necessary. I was asked for the ledger sheets.

Q. That paper is not destroyed?

A. No, sir.

Q. It is there but has not been produced, is that right?

111 A. Yes, sir.

Q. There is another entry immediately following, also on the 24th of July, of $14.18, the same folio, page 5?

A. Yes, sir.

Q. That is against Mr. Blake, too?

A. Yes, sir.

Q. That is charged against Blake in Figg's account, is that right?

A. Yes; they are checks issued directly to W. A. Blake.

Q. Why were they put in Figg's account?

A. Because, as I say, I didn't want to start a new account for Blake. I didn't know how long we would be buying from him. After we bought two cars I saw we were going to do business with him and I opened up a new account of my own accord, because nobody there had any charge over the books when I took charge of them. Mr. McKee never saw them.

Q. On the 8th of August you started an account with Mr. Blake himself, is that right?

A. I believe that was the date.

Q. On the 8th of August Blake's account begins with an entry of $200.00, is that right?

A. If it shows on the sheet there that is what it is.

Q. There is no word "Blake" there except that word at the top of the page, but what is that?

A. If there is nothing else designated it is a check issued to Mr. Blake.

Q. What does "C. B." mean?

A. Cash book.

Q. That is the same folio as used there?

A. Yes, sir.

Q. Prior to that time and on the 30th of July, is an entry "W. A. Blake, folio 157, page 8," which folio, I suppose, is in Muscatine?

A. Yes, sir.

Q. And has this original entry: You did not produce it?

A. No, sir.

Q. What does that entry of $200.00 on the 30th of July refer to; a check issued to Blake?

A. Yes, sir. I can show you the counter-entries on that ledger so it would not affect the balance of Mr. Figg's account at all.

Q. On the 8th of August is an item of $149.67: This is in Mr. Figg's account. That is the same date on which Mr. Blake's account was opened. That was probably an item before you opened this new account, is that right?

A. Yes, sir.

Q. Do you know what that item was for; what the money was sent to him for?

A. For shells.

Q. All these items in Blake's name were for shells, were they not?

A. Yes, as far as I know.

112 Q. That $3,500.00 on the 8th of August, was that sent for shells, too?

A. That was not sent to Blake. That is not marked "Blake" there. No; that ditto mark is under the initials "C. B."

Q. That does not apply to Blake at all?

A. No.

Q. That $3,500.00 applies to something else?

A. To Mr. Figg.

Q. The only two items of Blake's are $149.67 and $20.57——

A. I believe there are five entries altogether on that sheet.

Q. I am speaking of that date, the 8th of August.

A. I think there are two checks.

Q. Was not that $20.57 the money advanced to Blake for his trip coming up to Muscatine from below, and returning?

A. No, sir.

Q. You don't know what it was for?

A. Yes, I have a record showing——

Q. Let us see the record.

A. They have it back there; that book (indicating on table).

Q. I mean this $20.57 item, folio 163, page 8.

A. I think it refers to a car number. If you will show me the car number.

Q. Look and see; maybe you can tell (handing witness paper).

A. This $20.57 is what you have reference to?

Q. Yes, and the $149.67.

A. The total paid for that car was $270.24. I think that equals those two items.

Q. Why were they divided?

A. I don't know; that is the way I was told to issue the checks, and then I gave credit for the car, which balanced those three items out of that nine dollars a ton.

Q. Nine dollars a ton for the total?

A. Yes, sir.

Q. Is that smaller item that $8.50 a ton?

A. How is that?

Q. Is that smaller item of $8.50 a ton?

A. No.

Q. It would not figure that way?

A. The checks were written out to Mr. Blake and nothing else on the check but W. A. Blake, as far as I remember.

Q. Was it before or a later time when the practice of sending him a check of $8.50 a ton was sent to him to be shown to the boys, and then an extra one for the extra fifty cents; when did that begin?

A. On the first car there is two checks issued, is there——

Q. Yes.

A. That is the way I was told to write them out. The way I understood it was nine dollars a ton. That is the way I entered it in the shell record, as nine dollars. There is no other
113 designation, and the two amounts that were paid equal nine dollars a ton.

Q. You had better take a glance at that so we will save a little time: The account that I am now showing you is the account of Blake, is it not?

A. Yes, sir.

Q. In these items that follow is not each item of those cars with the divided check, a small amount and a large amount; one at the rate of $8.50 a ton, and the other for the extra amount; is not that a fact?

A. Whichever way they figure. They total nine dollars a ton, and that is the way the payment was made.

ARTHUR D. HOWARD, a witness of lawful age, being sworn and examined, testified, in substance, on behalf of the defendants as follows:

Direct examination.

By Mr. Hocker:

I live in Muscatine, Iowa; I am Biologist for the Bureau of Fisheries, Government Bureau of Fisheries. Am connected with the Government work in connection with fisheries.

The work of this particular station was established in the first place through the influence of the shell men of Muscatine, to promote the interest of the shells, the conservation of shells in the United States; and the development of them, and study; in order to

conserve them and encourage their development it is necessary to investigate their life history. I have been engaged in that work six years. In the course of that work it has become necessary for me to become informed as to the habits and customs, the mode of life, propagation, and so forth, of mussels. I have handled them and dealt with them with that idea in view; that has been my work, chiefly. I have been chiefly devoting myself to the understanding of mussels.

The mussel, the fresh water mussel, is one of the group of mollusks. It is ordinarily called a bivalve. It is a shell fish; considered a fish. It has an organ of locomotion called a foot by which it propels itself. It extends the foot in the mud and slightly swells up so as to hold it there, and then draws the body and shell after it. Then it repeats that movement and extends the foot again and takes hold on the mud and draws itself after it. They can also attach themselves where they are on glass, or anything of that sort, moved by gravity, and fasten on a glass, a sort of suction creating a vacuum under the foot and draw themselves—I have experimented with them in tanks and otherwise, in order to observe that in all shapes.

114 I have here a photograph of some of them in a tank. The grooves or lines that seem to be in the substance of the bottom of the tank are the lines, the paths of the mussels in their movement. When I first took these—first lowered the water on those mussels they were quiet, but as the current was shut off they began to move about, and you see there the tracks of the mussels. It is the habit of the mussel, if conditions are favorable and it is getting all the food, and sufficient air, to remain quiet. When conditions change it begins to move. I am experimenting, also under the Government's authority, to investigate the food value of the fishy part of the mollusk. This year during the war we have been trying various methods of cooking them and gathering them. Unfortunately, that work has been embarrassed somewhat by the burning of our building, but we were carrying that on up to the time the building was burned, this year. I know how the mussels are caught in the shell industry. I carried on a survey of two and a half months investigating beds, and we used that method (prongs) chiefly in catching them. The mussel, you might say, has what we call a posterior end into which it draws the water up-stream, and as the mussel fisherman comes down-stream with his crowfoot and catches them, just as soon as their tentacles on the edge of the—as soon as the contact causes them to close up tight on it in order to shut out the enemy, they hang on, and when the mussel fisherman gets to the end of his run he hauls them up. I have observed them traveling up-stream. We put them in crates with an open upper end and some of them escaped in that way through the upper end, against the stream. I have made notes on the distance they move at any time, but I should say—I haven't them here, but I should say twenty-five and thirty feet. I am sure I have seen them move that far, and probably farther than that, at the rate of say about two hundred feet a day.

Cross-examination.

By Mr. Barclay:

I mean that their habit is to move when conditions are not satisfactory. When the water is very low, their motion is less liable to occur. The great mass of those that are sued for commercial purposes, that is, for making buttons, are dug out of the bed of the river. These shells have considerable commercial value. They vary considerably in quality. The quality of shells is not right in my department and I am not familiar with this particular (Little River) shell. All fresh water mussels, so far as I know, move. They are well equipped to move. If they are getting food and oxygen they are not so apt to move, but when the water gets low or conditions are unfavorable they move. The greater part of the chemical ma-
115 terial forming these shells is calcium carbonate; and some calcium phosphate, and also calcium carbonate.

Redirect examination.

By Mr. Hocker:

Q. Are these mussels protected by the game laws of the various states, in seasons?
A. Yes, sir.

Mr. Barclay: That is a matter of law which this gentleman cannot answer. That is objected to. We have the statute here; we are relying on that ourselves.
Mr. Hocker: The Court will take judicial notice of that, I suppose.

E. M. DENNISON, a witness of lawful age, being duly sworn and examined, testified in substance, on behalf of the defendants, as follows:

Direct examination.

By Mr. Hoffman:

I live in Burlington, Iowa. I have charge of the buying of mussel shells for Harvey Chalmers & Son, Amsterdam, New York. I have been engaged in that business for twenty-one years. I do many things beside buy shells when I have time, for the concern. I have been with them most of the time since they started, but my particular business is buying shells; superintending the buying, prospecting, and so forth. I have investigated the shell beds of the different rivers that empty into the Mississippi and also the tributaries, and the tributaries to tributaries.

I have seen mussels move through the ice. At one time in 1899, soon after we started a factory at Wittenberg, Iowa I was down to the river on a shell bed and the river had frozen over clear, very clear; the ice and water were so clear that you could see the bottom at quite a little distance. The water was falling and freezing, and

they were all moving to deeper water. I followed their tracks over fifty feet. They would then run off too deep to see the track, but evidently from the fact that the water was going down—I presume from that reason; I am assuming that, of course—they were getting to deeper water, for some reason. They will move from a bed that is not suitable, or a portion of the river that is not suitable, to one that is suitable. By "suitable" or "not suitable" I refer to the conditions. I cannot tell, of course, farther than I am telling that. In the White River, Arkansas, there will be beds this year where there are none next year; and ofttimes where we have overworked, down to
116 the little fellows—the big ones you always catch first—there will be this year nothing but little ones when they get through with a bed. The next spring on that same bed there will be plenty of larger ones. I don't know how long it takes for them to mature, but they keep from ten to older—full grown shells. I mean years. The professor can tell you more about the age than I can, but I think they can live to be very old. I don't know whether anybody knows how old they live to be or not. Some grow more rapidly than others, they are not a swift growing thing. It takes a number of years to grow from a small shell to a large one. They grow every season for a number of seasons. In 1906 I was up near Brandenburg with Mr. Soper, and a man caught a shell that was not evidently a very old shell, but it had ground into it "1884." That was twenty-one or twenty-two years. I think that was in 1906. That was not an overly large shell; a good sized shell. Assuming that that was ground in in 1884, it had been there that long. As to how old they live, I don't know.

The Court: I don't think it is important how long they live.

Mussels move—I can't tell you the process or method, only I see them move through the ice. They move with what we term their foot. They reach out and pull themselves after them, I think. I have seen them move enough to see the movements. It would be hard for me to state how rapidly they move. I have followed them in their tracks for over fifty feet through the ice, but how long it took them to go that fifty feet I don't know. I was never on Little River; but I have seen shells from there.

HENRY F. KATH, a witness of lawful age, being sworn and examined, testified, in substance, on behalf of the defendants as follows:

Direct examination.

By Mr. Hoffman:

I live in Muscatine, Iowa; have lived there about five years. I am a dealer in mussel shells, buying and selling, and selling on commission. I operated during this time on all the rivers that mussel shells are dug on in the United States. There is quite a good many varieties of shells; there is the niggerhead, pig toe, three-ridge, the wash-board, the pocket, and the sand shell. The three-ridge is one

of the cheaper grades of shell; one of the poorest, and one
117 reason is that it is ridgy and streaked with brown spots all the way through it. When they cut it you can see the brown streaks. They don't produce a white button like the niggerheads.

I know that shells travel quite a good deal. It depends a good deal on the stage of the water. If the water is falling they travel faster, and when the water is raising then they come out to feed on the shallow waters at night. I have seen them move. The way they move is: They lay this way (illustrating with hands) and they project a muscle that adheres to the sand or mud which is ahead of it, and then it pulls the shell part to it, and then it sticks the muscle out and—in many localities they dig them and hunt them at night, especially the sand shell variety, because from the shining of the light it looks like a little ball in the water where they are moving. They move in the water itself, on the bottom of the river. They have made lights that they shine and when they see these little balls they pick them up. At night time they come out on shallow water to feed. I have seen them move in sandbars in the Mississippi River as much as one hundred yards at night; one variety called the sand shell, I have seen move as much as one hundred yards when the river was falling.

I handled one car (of Little River shells) on commission. I sold it in Muscatine. I ought to know something about them. They were the three-ridge variety; it is a poor class of shell, not very valuable because of the poor quality of the material that is in the shell.

Cross-examination.

By Mr. Barclay:

I sold that car for $13.50 delivered in Muscatine. I charged $1.50 a ton for selling it.

Some vessels move more rapidly than others. To a certain extent, some of them are much more rapid in movement than others. They all move to feed. They all move a little. There is no fresh water clam; I am not familiar with the habits of the salt water clam. The fresh water mussels accumulate in beds where there is good feeding ground; wherever there is a bend, or vegetation in the water, is where they locate. They stay where there is plenty of food for them, and when the food is exhausted they move to other localities. The shells have a commercial value according to the quality of the shell.

Redirect examination.

By Mr. Hoffman:

The mussels accumulate in groups. They are lying distributed
118 on the surface of the bottom of the river, not one on top of the other. They burrow down, but there is always a part of the shell that projects above the earth. About one-half

of the shell sometimes burrows itself down. That is when it stan on its feet. When it is moving it don't lie on the side, but stan on its feet. If they buried themselves very deep a fellow wou never cut his foot when he went in swimming. They don't burr under the mud. They move from one feeding ground to anoth The beds move according to the changing of the rivers, and such that. They change their locations, change the feeding groun The beds have changed in a season. Different seasons of the ye These mussels are found in the Mississippi and its tributaries.

Mr. Hoffman: That is all.

Mr. Barclay: I might say that we do not intend to offer any exp evidence. I mention that merely to shorten the trial.

LEO LEMAIRE, a witness of lawful age, being duly sworn a examined, testified, in substance, on behalf of the defendants follows:

Direct examination.

By Mr. Hoffman:

I live in Burlington, Iowa; am a manufacturer of pearl butto I am treasurer and manager of the Mississippi Pearl Button Co pany, located at Burlington. We also have plants, cutting pla where we cut our blanks, at Memphis, Missouri; Warsaw, Illin Ft. Madison, Iowa; Dallas City, Illinois—we manufacture from t shell into the finished button. I have been engaged in this busin about twenty years.

In the early days of the business I used to go out on the river a buy shells a great deal. I know one time I went down on t Mississippi on the rapids below Montrose, Iowa, and there wa couple of men fishing across the river near Nauvoo, and I took boat and rowed over to where they were, and on my way ove found a great aggregation of shells, very fine shells. They were about two feet of water, or a little more. I stopped and I gather about fifty of them, and just as fast as I could pick them up, a throwed them in the boat. There must have been two or three ac at the bottom of the river just littered with those shells. Th I rowed to where these two parties were and I told them, "Why do you dig up those shells out yonder? You can get two ton a day there, easy." They said, "We are doing all right here; 119 are gathering all we can gather." I said, "After you through there"—I marked the place and showed them actly where it was lying, near an island on the shore—I said, "Rig there are two or three acres of shells; you can gather a ton or t tons a day," and they said they would. About a week after I w to buy their shells and they only had a few I said, "What is t trouble?" They said, "Why, the shells are all gone." I sa "Down where you were?" "Yes." I said, "How about the pl I showed you?" "All gone." I said, "You did not look good

go to it." So we got in a boat and went out, and there was not shell there. They all moved away; there was not a shell there. I have seen the shell move; they moved after we left. Some will awl away; a fast way of moving. They open up; they seem to flate themselves with air and open up and float down stream. hey seem to inflate themselves with air, and they will float about at much from the surface of the water, and I have seen whole cks of them just float down the stream. They just open up about e my hand; just open up and float down; the- float fast. I have n them move on the bottom of the river bed; just like that picture hich was introduced a while ago. I have seen them move that ay. I know when I thought I had a bed located, and two or three onths after I thought we were going to get them, and they were there. We couldn't find them. They move slow when they awl, but when they float they go fast.

(No cross-examination.)

Defendants rest.

And thereupon the plaintiff, in his behalf, introduced the follow- evidence in rebuttal:

J. E. McCLUNG, recalled, testified on behalf of the plaintiff in buttal, as follows:

Direct examination.

By Mr. Wallace:

Q. Something has been said here about there not having been retofore any suit of this nature: Do you know of any such suit?
A. There was a suit at Paducah, Kentucky, about three years go in regard to mussels I am not familiar with all the details of it.

Q. It has been stated that no one has ever been known to complain of the taking of shells: In your experience as a ussel man, do you know of any complaint that has ever been made, ther to you or to others?

Mr. Hocker (to Mr. Wallace): Prior to 1913?
Mr. Wallace: Yes; or 1914.

A. I have been stopped from taking out shells.
Q. Where have you been stopped from taking out shells?
A. The tributary of the Rock River, once; and I don't think any- dy has been able to take any there since, not to my knowledge, r time.
Q. Have you known of other people being stopped from doing e same thing?
A. Yes, sir.
Q. When that would happened would they go away or——

A. They would either pay for the privilege of taking them out or leave.

Mr. Wallace: That is all.

(No cross-examination.)

The Court: Is there anything further?

Mr. Wallace: If Mr. Gratz is here, we want to show the exact nature of this man, Warren's authority down there; that is, that he was care-taker to look after the timber.

The Court (to defendants' counsel): Do you admit that was his employment there?

Mr. Hoffman: The testimony shows.

Mr. Hocker: As far as I am concerned, I will be glad to do it.

The Court: Very well.

Mr. Barclay: If the Court please, I want to have the record show that I have offered in evidence these ledger sheets showing the accounts of Blake and Figg, produced by the defendants. In order to have the originals returned to the defendants immediately, Miss Cook will copy them, and return the originals to the defendants.

The Court: Very well.

The papers last referred to were marked "Plaintiff's Exhibits 16 and 17" and are in the words and figures as follows, to wit:

Original—McKee & Bliven Button Co.

(Ledger Sheets Showing Account of McKee & Bliven Button Company with James Figg.)

Sheet No. 1.

125.

Name James Figg, Shell Money Advanced.

Address.

Date, 1913.		Folio.	√	Debits.	Bal.	Credits.	√	Folio.			Date.
May 20		C B 127		2,000.00		590.69		J. 40	Car	#16455-8599	June 21
June 3		" 133		2,000.00		713.07		"		#111818	21
14		" 137		2,000.00		402.60		"		#133593	21
20		" 139		2,000.00		587.39		" 42		#15030	26
23	W. Parish	" "		216.00		688.25		" "		#71314	26
25	E. W. Morgan	" 141	1	617.28		*5,931.38		*√		*Balance	*June 30
				8,833.88		8,833.88					
July 1	Balance	√		5,931.38		570.17		J. 47	Car	#85863	July 9
5		C B 147		2,500.00		589.20		" "	"	#33229	9
9	W. Parish	" 149	2	375.83		617.28	1	J. 48	"	#4372	

(PLAINTIFF'S EXHIBIT 16.)—*Continued.*

Date. 1913.		Folio.	√	Debits.	Bal.	Credits.	√	Folio.		Date.
12		C B 194		2,000.00		380.00		J. 48	Car #16819	
14		" 151		3,500.00		366.60		" "	" #97604	
21	W. Parish	" "	3	426.98		646.40		" 51	" #184698	24
22		" "		2,500.00		605.18		" "	" #76256	
24	Chief Prairie Dog	" 153	4	147.80		615.90		" "	" #89948	
	W. A. Blake	" "	5	241.08		331.16		" "	" #13104	
	"	" "	5	14.18		585.73		" 58	" #11508	Aug. 11
25	W. Parish	" "	6	366.08		438.14		" "	" #130120	
26		" "		5,000.00		500.49		" "	" #37433	
30	G. W. Morgan	" 157	7	1,062.47		684.90		" "	" #20028	
	W. A. Blake	" "	8	200.00		621.25		" "	" #58117	
Aug. 4	Wm. King	" 159		242.40		592.02		" 59	" #135574	
8	W. A. Blake	" 163	8	149.67		700.00		" "	" #100204	
	"	" "	8	20.57		375.83	2	" "	" #131386	
		" "		3,500.00		366.08	6	" "	" #794637	
9	W. Parish	" "	9	737.58		640.10		" "	" #552949	
13		" "		3,000.00		X 520.36	7	" 61	" #92479	18
14	Mt. Carmel	" "		608.30		255.26	5	" "	" #121843	
15	N. T. Gray	" 165	10	459.58		317.40		" "	" #8374	
	Forward		√	32,983.90		11,319.50		√	Forward	

(The following appears on reverse side of foregoing account:)

Sheet No. 1.

125.

Name James Figg, Shell Money Advanced.

Address.

8—282

Date. 1913.			Folio.	√	Debits.	Balance.	Credits.	√	Folio.		Date, 1913.
	Forward		√		32,983.90		11,319.50		√	Forward	
Aug. 18	W. Parish	C B	165	11	489.31		147.80	4	J. 61	#52508	Aug. 18
21	G. W. Morgan	"	"	12	1,509.19 X		542.11	7	" "	#20253	
		"	167		5,000.00		440.00		" "	#81413	
23	W. Parish	"	"	13	184.01		1,410.55		" "	#26984 and 6646	
	Mt. C. E. Co.	"	"	14	660.00		616.65		" "	#14975	
28	Chief P. Dog	"	"	15	343.15		551.82		" "	#49340	
29		"	169		2,500.00		475.60		" "	#20841	
Sept. 4		"	171		3,000.00		653.69		" "	#58449	
6	G. W. Morgan	"	"	16	1,112.71 X		389.55		" "	#63832	
11	" " "	"	173	17	916.60 X		855.15		" "	#515874	
							1,005.46		" "	#114237	
							505.57		" "	#84496	
							370.24	8	" 63	#13996	27

(PLAINTIFF'S EXHIBIT 16.)—*Continued.*

Date, 1913.	Folio.	√	Debits.	Balance.	Credits.	√	Folio.		Date. 1913.
					459.58	10	J. 63	#88952	
					451.18	9	" "	#39419	
					286.40	9	" "	#52228	
					509.33		" "	#65965	
					608.30		" "	#15315	
					753.60		" "	#19352	
					513.47		" "	#60524	
					426.98	3	" "	#41423	
					493.35		" "	#97354	
					489.31	11	" 69	#124493	Sept. 11
					184.01	13	" "	#27771	
								#7434	
					X 1,509.19	12	" "	#38016	
					901.08		" "	#122688	
					343.15	15	" "	#32850	
					708.62		" "	#32463	
Forward		√	48,698.87		27,921.15		√	Frd.	

(Ledger sheets showing account of McKee & Bliven Button Company with William A. Blake.)

Sheet No. 1. 130

Name Wm. A. Blake,
Address Shell Money Advanced

Date.	Car No.		Folio.	√	Debits. Balance	Credits.	√	Folio.	Car No.	Date.
1913.										1913.
Aug. 8		C B	163		200.00	281.34		J 69	#97255	Sep. 11
16	#124595	"	165		371.11	392.94		" 71	#124595	19
	"	"	"		21.83	238.30		" 77	#17762	Oct. 6
22		"	167		150.00	298.28		" "	#19418	
23	#97255	"	"		15.63	400.88		" "	#116740	
	"	"	"		265.71	238.10		" 83	#27814	24
										1914.
29	#116740	"	169		378.61	262.90		C B 220	Deposited	Jan. 8
	"	"	"		22.27					
Sept. 12	#19418	"	175		281.78					
	"	"	"		16.50					
Oct. 1	#17762	"	181		225.06					
		"	"		13.24					
20		"	189		150.00					
1914.										
Jan. 30	as 1/8	P C	347		1.00					
					2,112.74	2,112.74				

(PLAINTIFF'S EXHIBIT 17.)—*Continued.*

Date.	Car No.		Folio.	√	Debits. Balance.	Credits.	√	Folio.	Car No.	Date.
1914.										
July 18	Advanced	C B	20		150.00	287.39	J	170	#3667	Sept. 4
Aug. 7	"	"	24		137.39					
					287.39	287.39				
1915.										
	Advanced for trip									Nov. 30
Mar. 22	back to Musc. P. C.		291		15.00	81.31	J	276		Nov. 30
Oct. 21	Adv. by Figg C. B.		184		30.00	*50.00		√	Balance	
8	Pd. Cash P. C.		3		36.31					
Nov. 6	Adv. for trip shell C. B.		190		50.00					
					131.31	131.31				
Dec. 1	Balance			√	50.00 (+)	√				
1916.										
Apr. 3	Adv.	C B	256		50.00 ⊙					
June 10		"	286		500.00					
July 22		"	300		500.00					
Aug. 3		"	304		500.00					
12		"	308		500.00					
	Fwd.			√	2,100.00					

(The following appears on reverse side of foregoing account:)

Sheet No. 1

130

Name Wm. A. Blake
Address

1916.											1916.	
	Forward		V	2,100.00		810.53	J	362	#89218		Oct. 13	
Aug. 19		C	310	1,000.00		1,103.49	"	"	#576222			
23		"	"	500.00		1,050.56	"	"	#119678			
29		"	312	1,000.00		867.78	"	365	#1107		Nov. 6	
Sept. 6		"	314	500.00	X	500.00	C	339	Ck. destroyed #12888		20	
18		"	318	500.00		789.57	J	367	#28661		18	
									}#28661			
20		"	320	500.00		127.42	"	368	Loody	}#119628	22	
22		"	320	500.00		244.63	"	"	Exp. to 11/1		22	
Oct. 4		"	324	500.00		*3,331.02		V	Balance		Dec. 30	
28		"	332	300.00								
Nov. 16	J. W. Borry Adv.	J	366	25.00 ⊙								
9		C	33	500.00 X								
13		"	"	500.00								
Dec. 9		"	346	200.00								
22		"	350	200.00								
				8,825.00		8,825.00						
1917.											1917.	
Jan. 1	Balance			3,331.02		1,163.37	J	385	#6641 Katy		Feb. 26	65149#
8		C	356	250.00		1,228.22	"	"	#194967 "			66910#
May 2		"	390	50.00		923.04	"	389	#24446 L. C.		Mar. 29	56054#
16		"	394	500.00		720.28	"	410	#306863 Blk.		Sep. 18	49920#
July 6		"	408	500.00		859.61	"	413	#54080 Muse.		Oct. 11	60366#
14		"	410	500.00		60.09	"	417	Exp. 11/1 to 1/26		Nov. 16	
Aug. 15		"	420	500.00	⊙	125.00	"	417	Adv. him 1916			

(PLAINTIFF'S EXHIBIT 17.)—*Continued.*

Date.		Folio.	√	Debits.	Balance.	Credits.	√	Folio.		Date.	
Sep.	8	C	426	250.00		363.55	J	417	Exp. 1/26 to 10/30		
	13	"	428	500.00		18.49	"	419	Exp. Nov.	Dec. 5	
	20	"	430	500.00		561.66	"	422	#12506 C. J.	18	62668#
Oct.	19	"	438	500.00		465.00	"	426	Salary 1917	31	361059#
Nov.	20	"	446	250.00		*1,142.71		√	Bal. Ford.	Dec. 31	
				7,631.02		7,631.02					

*In red ink in copy.

124 Hereupon, the introduction of evidence was closed.

Mr. Barclay: We want to file a motion to strike out the answer of the defendants, and ask for judgment by default for failure to produce papers which the Court ordered produced on May 23rd.

The Court: You may file it.

Such motion is as follows:

Motion for Judgment.

#4593.

BENJ. GRATZ

vs.

McK. & B. B. Co.

Plaintiff moves the Court for an order striking out defendant's answer, or for a judgment as by default for plaintiff, because of defendant's failure to comply with the Court's order for the production of papers pursuant to section 724 of the Revised Statutes of the United States.

BARCLAY & WALLACE,
Attys. for Plaintiff."

(*Memorandum Opinion of the District Court and Peremptory Instruction for a Verdict for Defendant and Exceptions Thereto.*)

The COURT:

Whether right or wrong, my view of this most interesting controversy still remains the same as it has been from the beginning of this case.

What are the facts? The assignors of the rights involved in this case own certain lands in Pemiscot County, in this State. Through these lands flows the Little River, a non-navigable stream, shown by the evidence to be about two hundred miles in length. This river flows into the St. Francois River, and the St. Francois River, as we all know as a matter of geography, empties into the Mississippi River.

As I have said, the Little River is a non-navigable stream. The owners of the lands own the bed of the stream. They do not own the water which flows in the stream. That belongs to the State.

In the stream there grew, or came onto the property of the plaintiffs, mussels which were taken therefrom; the shells were removed and shipped to these defendants in Muscatine, Iowa. These
125 mussels were taken from the stream by those engaged in the business of gathering mussels for the shells, which shells have become valuable in the industry of button making.

The question in the case is, has the plaintiff in the case shown such a property right in these shells as to allow plaintiff to recover in this action for the value of the shells?

This is an action such as at common law would be denominated quare clausum fregit.

If a man goes onto my land and cuts timber, timber is a part of the land, and I can recover in such an action as this for the cutting of the timber on my land. If I have cut down the timber and it is there in logs, they have become personal property. Or, if one goes onto my place and quarries rock or quarries coal. If you break and enter the close and carry away personal property from my land, or from my farm, the common law action of de bonis asportatis will lie.

The question here is whether these mussels, which the mussel hunters went there and appropriated, were part of the real estate. The close was broken and entered before the mussels were taken out of the water.

Under the laws enforced in our country, where we have laws against trespass, but no laws against poaching, I am clearly of the opinion that the property rights of all those things wild by nature, ferae naturae, such as wild game, wild fowl, animals, wild fur-bearing animals, and all of such things, is vested in the State in trust for every citizen of the State, and the title is precisely the same in navigable waters as it is non-navigable waters, and non-navigable as it is in navigable.

That is not true under certain conditions. If I build a pond on my farm that has no connection with the outside world and I stock it with fish, the water and the fish are mine, and no one can come on there and take them.

If I build a preserve and keep my wild animals in it for the purpose of having the skins for the market, that is my private property. They are reduced to my possession by the very fact that they are enclosed and do not belong to the public.

If it sees fit, the State can absolutely preclude the owners of this land, and every other person, from taking mussels from this stream just as it could if it passed a law that no fish are to be caught
126 out of this stream. It may punish the owner of the land for taking out fish. Of course it could not do that if he took them out of his pond.

So the right here demanded by plaintiff, the title here claimed by him, is based on the right to this land. These people have the land and they have a right to all that is called land—realty, but the fish that swim in the water; the mussels that make their way along the bed, or the wild fur-bearing animals that swim up and down the stream and burrow in the ground are not a part of the land; all of those things are the common heritage of the people of this State, and this State holds the title in trust.

It is true that if I own a piece of land I am not compelled to allow everybody to tramp over my land. Although the wild animals there, or the wild birds, are no more mine than they are other people's, yet the land is mine. I can prohibit people from coming on my land because they trample down my grass; break fences; let the gate stay open, and so on.

These owners could have prohibited the mussel gatherers from making fires on the banks and boiling out the shells, but all they

did was in principle and law just the same as a man who traps a muskrat and takes it on shore and there pelts it. So while technically these mussel hunters who went on that land were trespassers and might have been driven out—the owners were not compelled to allow it—yet they were not ordered off as trespassers, and they took out these mussels; took the shells and shipped them to the defendants. Whatever damage was done, was done by those who went there and took the mussels. But that is not what was sued for. It is not for tramping down the corn, or burning your wood. It is the value of these shells and of these mussels when they were taken.

To my mind there can be no question of the law, so there will be a verdict for the defendants.

Mr. Barclay: Your Honor will allow us an exception to your Honor's separate rulings—the question of title; the question of private ownership; the question of our right to enjoy the fruits of this property, and, of course, an exception to the peremptory instruction for a verdict?

The Court: Yes.

The Court: What I am holding here is that you sue for the value of these shells—there is no claim in this case, is there, for the mere breaking of the close?

127 Mr. Barclay: Oh, no; we are suing for the value of the shells.

And thereupon the following verdict was entered:

(See record proper) [Marginal page 32 of this printed record].

"Plaintiff's Motion for New Trial.

And thereafter, to-wit, upon the 29th day of May, 1918, and within four days after the rendition of said verdict and at the same term of Court, the plaintiff, by his counsel, filed his motion for a new trial, which said motion for a new trial (formal parts omitted) is as follows, to-wit:

Comes now plaintiff by his attorneys and moves the Court to set aside the verdict herein and to order a new trial of the issues in the above entitled cause of Benjamin Gratz vs. McKee & Bliven Button Co., et al. (No. 4593) and for grounds of his motion assigns the following, to-wit:

1. The Court erred in directing a verdict for defendants;

2. The Court erred in charging the jury to return a verdict for defendants;

3. The Court erred in sustaining the motion of defendants to direct a verdict for them;

4. The Court erred in charging the jury that plaintiff was not entitled to recover under the law and the evidence;

5. The Court erred in charging the jury that plaintiff had no title to the shells;

6. The Court erred in charging the jury that defendants had the right to take the shells from Little River;

7. The Court erred in not sustaining plaintiff's motion for judgment for failure to produce the papers mentioned in the order of Court of May 23rd, 1918;

8. The Court erred in charging the jury that mussel shells were subject to caption upon the said property of plaintiff's assignors;

9. The Court erred in not submitting the issues joined to the jury;

10. The Court erred in excluding competent and relevant evidence offered by plaintiff.

128 11. The Court erred in excluding testimony of the value of said shells converted by defendants, as of the time while same were in possession of defendants at Muscatine, Iowa;

12. The Court erred in excluding competent and relevant testimony for plaintiff as to the value of said shells converted by defendants after manufacture of same into buttons while in defendants' possession.

For each of said errors and grounds, each of which was prejudicial to the substantial rights of plaintiff on the merits, said plaintiff moves and prays the Court to set aside said verdict and to grant a new trial in said cause."

(Certificate of Judge to Bill of Exceptions.)

Forasmuch, as said matters do not appear of record herein, the plaintiff, Benjamin Gratz, prepared and now presents this his Bill of Exceptions, and prays that the same may be signed, sealed and made a part of the record, which is accordingly done on this 18th day of Sept., 1918.

(Signed) JOHN C. POLLOCK. [SEAL.]
Judge Sitting as District Judge in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

O. K.
JONES, HOCKER, SULLIVAN & ANGERT, AND
HOFFMAN & HOFFMAN,
Attorneys for Defendants.

(Endorsed: "Filed Sept. 19, 1918, W. W. Nall, Clerk.")

(Order Allowing Writ of Error, etc.)

Now at this day comes the said plaintiff by attorneys, and fi an assignment of errors, a petition for a writ of error in this cau returnable to the United States Circuit Court of Appeals for t

Eighth Circuit, and a bond for costs; upon due consideration whereof, the Court doth approve the said bond, and doth allow the said writ of error as prayed; and now a citation citing and admonishing the said defendants to appear before the said Court of Appeals within Sixty Days from this date, is signed by the Judge and filed. Præcipe for transcript filed.

September 23rd, 1918. DAVID P. DYER,
Judge.

129 *Assignment of Errors.*

Now comes the plaintiff in the above entitled cause of Benjamin Gratz, plaintiff, vs. McKee & Bliven Button Company, et al., defendants, by his attorneys, and files this his Assignment of Errors upon the judgment rendered in said cause, on May 29, 1918, in the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, and in the record and proceedings in said cause; and plaintiff avers that there is manifest error therein to his prejudice upon the merits of his cause of action in the following particulars which he assigns, to-wit:

1. The said District Court erred in sustaining defendants' demurrer to the evidence.

2. The said District Court erred in directing a verdict for said defendants.

3. The said District Court erred in rendering and entering judgment for said defendants.

4. The said District Court erred in ruling and adjudging that neither plaintiff nor his assignors, owners of the lands described in the pleadings, had any property right in the shells taken therefrom by the defendants.

5. The said District Court erred in ruling and adjudging that neither plaintiff nor his assignors had standing or capacity to maintain said action and that plaintiff and his assignors possessed no right, title, interest or estate in or to said shells sufficient to authorize the maintenance of said action.

6. The said District Court erred in ruling and adjudging that the owner of lands from which valuable property, such as the shells mentioned, is unlawfully taken by wil-full trespassers, may not recover therefor in an action at law.

7. The said District Court erred in ruling and adjudging that the owners of land who own the bed of a non-navigable stream thereon do not own all of the property of value in such stream.

8. The said District Court erred in its ruling as to the nature of plaintiff's cause of action.

9. The said District Court erred in ruling and adjudging that said shells were not part of the real estate on which same were taken and were stored.

130 10. The said District Court erred in ruling that the mussels around which said shells grew and were formed, were governed, so far as rights of property therein are concerned, by principles applicable to animals feræ naturæ.

11. The said District Court erred in ruling that the property rights in said shells on said lands was vested in the State in trust for the citizens thereof, or otherwise.

12. The said District Court erred in not awarding and entering judgment for said plaintiff, and in not striking out defendants' answer, pursuant to plaintiff's motion therefor under Section 724 of the Revised Statutes of the United States, because of defendants' failure and refusal to comply with the order of said District Court previously made, for the production at the trial of the records therein specified.

13. The said District Court erred in excluding competent, relevant and material evidence offered by the plaintiff to sustain the issues in said cause.

14. The said District Court erred in excluding competent and material testimony, offered by plaintiff, of the value of said shells wilfully converted by defendants, after the manufacture of same by defendants into buttons at Muscatine, Iowa, during the years 1913 and 1914, and while said manufactured product (buttons) remained there in said defendant's possession.

15. The said District Court erred in excluding all evidence or testimony tending to show the value of the product, in defendants' possession, manufactured by defendants out of the shells converted by them.

16. The said District Court erred in excluding competent and material testimony, offered by plaintiff, concerning and showing the value of said shells, during the years 1913 and 1914, while same were in defendant's possession at Muscatine, Iowa.

17. The said District Court erred in excluding competent, relevant and material testimony for plaintiff offered by and during the examination of witnesses, as follows:

"Q. Do you know the fair market value of such shells as the Little River shells?

A. I think I do.

Q. Please state what such value of those shells was in the city of Muscatine, Iowa, where you live, in the year 1913.

Mr. Hocker: I object to that as not being a proper measure of damages—Muscatine, Iowa.

131 Mr. Wallace: It is simply an element in the proof.

The Court: The objection is sustained. This is an action for the injury to the realty. It is brought by the assignee of the owner of the land. So the measure of damages for the taking of the land is the value of the property taken in place of the land.

(Here ensued colloquy between Court and Counsel).

The Court: I am going to exclude it.

Mr. Barclay: We offer to show the value of this property, that is to say, these shells which were taken by the defendants from the property of the plaintiff, at Muscatine, Iowa; the value is to be proven as to Muscatine, both in the first and unmanufactured state, and we make the second offer of the same kind as to the manufactured goods.

Mr. Hocker: I make the same objection.

The Court: I cannot let you put that in.

To which ruling of the Court the plaintiff, by his counsel, then and there, at the time, duly excepted and said exception was allowed."

18. The said District Court erred in excluding competent, relevant and material testimony for plaintiff offered by and during the examination of a witness for plaintiff as follows:

"Mr. Wallace: Please state the reasonable market value of the Little River shells, such as we have been talking about, in the city of Muscatine, Iowa, during the years 1913 and 1914.

Mr. Hocker: I make the same objection as before.

Mr. Hoffman: And that it is incompetent, irrelevant and immaterial, and not the proper measure of damages.

The Court: Objection sustained.

To which ruling of the Court the plaintiff, by his counsel, then and there, at the time, duly excepted, and said exception was allowed."

19. The said District Court erred in excluding competent, relevant and material testimony for plaintiff offered by and during the examination of a witness for plaintiff as follows:

"Mr. Wallace: We offer to read in evidence the depositions of Jake Lemkau, John Butler and Henry Umlandt, for the purpose of showing the value of these shells at Muscatine, Iowa, during
132 1913 and 1914, and also for the purpose of showing in connection with the offered testimony of J. E. McClung, the quantity of buttons manufactured from said shells during said years, and the value during said years of said buttons.

Mr. Hocker: That is objected to as not being directed to the proper element or measure of damage in the case.

The Court: I will sustain the objection. That certainly cannot be done.

To which ruling of the Court the plaintiff, by his counsel, then and there, at the time, duly excepted, and his exception was allowed."

20. The learned trial Judge in said District Court erred in charging the Jury (against objection and exception by plaintiff) as follows:

"So the right here demanded by plaintiff, the title here claimed by him, is based on the right to this land. These people have the land and they have a right to all that is called land—realty, but the

fish that swim in the water; the mussels that make their way along the bed, or the wild fur-bearing animals that swim up and down the stream and burrow in the ground are not a part of the land; all of those things are the common heritage of the people of this State, and this State holds the title in trust."

21. The learned trial Judge in said District Court erred in charging the Jury (against objection and exception by plaintiff) as follows:

"To my mind there can be no question of the law, so there will be a verdict for the defendants."

Wherefore said plaintiff, Benjamin Gratz (plaintiff in error) by his attorneys, prays that the foregoing Assignments of Error, and each of same, be sustained; and that for each of said errors, and for any other plain error noticed by the Court in the record and proceedings of said cause, each and all of which were directly prejudicial to the substantial rights of plaintiff upon the merits of said cause, the said judgment rendered thereon, and each erroneous ruling of said District Court, be reversed, and that such other, further and proper relief may be granted to plaintiff as may be adjudged appropriate upon review thereof.

S. MAYNER WALLACE,
SHEPARD BARCLAY,
Of Counsel for said Plaintiff.

(Endorsed: Filed Sept. 23, 1918, W. W. Nall, Clerk.)

133 (*Petition for and Order Allowing Writ of Error.*)

To the Honorable David P. Dyer, Judge of Said District Court:

The above named plaintiff, Benjamin Gratz, your petitioner, deeming himself aggrieved by the judgment rendered in the above entitled cause, on the 29th day of May, 1918, and by the proceedings in said cause, hereby prays and petitions for the allowance of a Writ of Error to the United States Circuit Court of Appeals for the Eighth Circuit, having duly filed his Assignment of Errors; and your petitioner prays that such Writ of Error be allowed, and that Citation to the defendants be duly issued; to the end that a transcript of the record and proceedings upon which said judgment was rendered, duly authenticated, may be duly returned into said United States Circuit Court of Appeals for review and revision under the laws of the United States and the rules of said Court in such cases made and provided.

Your petitioner further prays for an order fixing the amount of security required of him for a stay of proceedings pending the hearing and decision upon said Writ of Error.

BENJAMIN GRATZ,
By His Attorneys, SHEPARD BARCLAY,
S. MAYNER WALLACE.

Writ of error allowed upon giving bond as required by law in the sum of $500, to be approved by the Judge of said District Court.

(Signed) DAVID P. DYER,
Judge District Court of the United States,
Eastern District of Missouri.

(Endorsed: Filed Sept. 23, 1918, W. W. Nall, Clerk.)

(*Bond on Writ of Error.*)

Know All Men By These Presents:

That we, Benjamin Gratz, as principal, and United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto James S. McKee, Nellie Canon Bliven, executrix of William E. Bliven, deceased, McKee & Bliven Button Company, in the full and just sum of five hundred ($500.) dollars, to be paid to the said James S. McKee, Nellie Canon Bliven, executrix of William E. Bliven, deceased, McKee & Bliven Button Company, their
134 heirs, executors, administrators and assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 20th day of September in the year of our Lord one thousand nine hundred and eighteen.

Whereas, lately at the March term A. D. 1918 of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, in a suit depending in said Court between Benjamin Gratz, plaintiff and James S. McKee, Nellie Canon Bliven, executrix of William E. Bliven, deceased, McKee & Bliven Button Company defendants judgment was rendered against the said plaintiff and said plaintiff has obtained a writ of error of the said Court to reverse the said judgment in the aforesaid suit, and a citation directed to the said James S. McKee, Nellie Canon Bliven, executrix of William E. Bliven, deceased, McKee & Bliven Button Company citing and admonishing them to be and appear in the United States Circuit Court of Appeals, for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said Citation.

Now the condition of the above obligation is such, that if the said plaintiff, Benjamin Gratz, shall prosecute said writ to effect, and answer all damages and costs if he fails to make good his said Writ and plea, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] BENJAMIN GRATZ.
[SEAL.] UNITED STATES FIDELITY & GUARANTY CO.
By E. R. NIEHAUS, *Attorney in Fact.*

Witnesses:
S. MAYNER WALLACE.

Approved by:
(Signed) DAVID P. DYER, *Judge.*

(Endorsed: Filed Sep. 23, 1918, W. W. Nall, Clerk.)

(*Clerk's Certificate to Transcript.*)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

I, W. W. Nall, Clerk of the District Court of the United States within and for the Eastern Division of the Eastern Judicial
135 District of Missouri, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings, in cause No. 4593 of Benjamin Gratz, Plaintiff, vs. McKee and Bliven Button Company et al., Defendants (save as restricted by præcipe for transcript hereinbefore set forth), as fully as the same remains on file and of record in said cause in my office; and that the original citation and writ of error are hereto attached and herewith returned.

In Witness whereof, I hereunto set my hand and affix the seal of said District Court at office in the City of St. Louis, Missouri, this 1st day of October, A. D., 1918.

[Seal U. S. Dist. Court, Eastern Div. East. Jud. Dist. of Missouri.]

W. W. NALL,
Clerk of said Court.
By OTTO O. FICKEISSEN,
Deputy Clerk.

Filed Oct. 1, 1918.
E. E. KOCH,
Clerk.

136 And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(*Appearance of Counsel for Plaintiff in Error.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5285.

BENJAMIN GRATZ, Plaintiff in Error,

vs.

JAMES S. MCKEE, et al.

The Clerk will enter our appearance as Counsel for the Plaintiff in Error.

SHEPARD BARCLAY.
S. MAYNER WALLACE.

Oct. 1, 1918.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 3, 1918.

(*Appearance of Mr. Lon O. Hocker and Mr. George F. Haid as Counsel for Defendants in Error.*)

The Clerk will enter my appearance as Counsel for the Defendants in Error.

LON O. HOCKER.
GEO. F HAID.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 30, 1918.

137 (*Appearance of Messrs. Hoffman & Hoffman as Counsel for Defendants in Error.*)

The Clerk will enter my appearance as Counsel for the Defendants in Error.

W. HOFFMAN,
ARTHUR HOFFMAN,
Muscatine, Iowa.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 2, 1918.

(*Order of Submission, January* 30, 1919.)

December Term, 1918.

Thursday, January 30, 1919.

This cause having been called for hearing in its regular order, argument was commenced by Mr. S. Mayner Wallace for plaintiff in error, continued by Mr. Frank H. Sullivan for defendants in error and concluded by Mr. Shepard Barclay for plaintiff in error.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

138 (*Opinion, April* 28, 1919.)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1918.

No. 5285.

BENJAMIN GRATZ, Plaintiff in Error.

vs.

JAMES S. MCKEE et al., Defendants in Error.

In Error to the District Court of the United States for the Eastern District of Missouri.

Mr. S. Mayner Wallace and Mr. Shepard Barclay, for plaintiff in error.

Mr. Frank H. Sullivan (Messrs. Hoffman & Hoffman and Messrs. Jones, Hocker, Sullivan & Angert were with him on the brief), for defendants in error.

Before Sanborn and Carland, Circuit Judges, and Munger, District Judge.

CARLAND, *Circuit Judge*, delivered the opinion of the Court.

The plaintiff in error hereafter plaintiff sued the defendants in error hereafter defendants to recover the value of 307½ tons of mussel shells alleged to have been taken from the lands of plaintiff's assignors in Pemiscot County, Missouri, and converted to defendants' use. A second count of the complaint alleged that the shells were a part of the realty and were dug up therefrom. The language used in the second count was for the purpose of bringing the case within the provisions of Section 5448 Rev. Stat. Mo. 1909, allowing treble damages in certain cases for digging up and carrying away
139 any substance or material being a part of the realty. The trial court, at the close of the evidence, directed a verdict for the defendants for the reason that the plaintiff had shown no title to the shells in his assignors. Upon the question of title the evidence tended to show that in the years 1913 and 1914, the St. Louis Union Trust Company owned approximately 1314 acres of land in Pemiscot County, Missouri, in Township 20, Range 12; that the Himmelberger-Harrison Lumber Co. owned 125 acres in the same County, in Township 20, Range 11; that Little River is a stream about 200 miles in length, flowing in a southwesterly direction through a portion of the above described lands. The river empties into the St. Francois River and thus finds its way to the Mississippi River and the Gulf of Mexico. The stream is non-navigable except in a very restricted sense. Near Wardell located near the center of Section 25, Township 20, Range 11, of the lands aforesaid, prior to the years 1913 and 1914, there came or grew in the bed of Little River, mussels. The shells of live mussels are valuable for use in making so-called pearl buttons. The mussel is boiled for the purpose of removing the meat from the shell. The fresh water mussel is one of the group of mollusks. It is a shell fish capable of locomotion but disinclined to exercise this power if its supply of food is sufficient where it is. It sometimes floats upon the water but usually lives in the beds of streams partially covered with mud. The defendants took from the bed of Little River, at a place where plaintiff's assignors were the owners of both banks of the stream, sufficient mussels to produce the number of tons of shells sued for. The plaintiff by assignment from the owners of the land became the owner of the claim for damages arising from the taking of the mussels. So far as the second count of the complaint is concerned we are of the opinion that it needs no consideration for the reason that in no view of the case could the live animal called mussel be deemed real estate any more than a ground-hog. The question for decision is, did the owners of the land through which Little River flowed own these shells

fish and hence their shells so that the plaintiff as assignee can maintain an action for their conversion. It appears that the mussels were in their natural state, that is, the owners of the land through
140 which the stream flowed had taken no measures to reduce them to private ownership nor were they planted where they were found, by such owners. As Little River is non-navigable, we assume that the owners of both banks thereof also owned the bed of the stream. The flowing waters of the stream, however, were public waters and fish whether swimming or shell found therein could not become under the laws of Missouri, the subject of private ownership. Sections 6508 and 6551 Rev. Stat. of Missouri 1909, read as follows:

Sec. 6508. "The ownership of and title to all birds, fish and game, whether resident, migratory or imported, in the State of Missouri, not now held by private ownership, legally acquired, is hereby declared to be in the state, and no fish, birds or game shall be caught, taken or killed in any manner or at any time, or had in possession, except the person so catching, taking, killing or having in possession shall consent that the title of said birds, fish and game shall be and remain in the State of Missouri, for the purpose of regulating and controlling the use and disposition of the same after such catching, taking or killing. The catching, taking, killing or having in possession of birds, fish or game at any time, or in any manner, by any person, shall be deemed a consent of said person that the title of the state shall be and remain in the state, for the purpose of regulating the use and disposition of the same, and said possession shall be consent to such title in the state."

Sec. 6551. "It is hereby declared unlawful for any person to engage in what is commonly known as 'pearl fishing' in any of the waters of this state at any time during the months of March, April, May and June. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense."

At the time Section 6508 was enacted neither plaintiff's assignors nor any other private individual or corporation had legally acquired an ownership of the mussels in question. It is no doubt true
141 that the above Sections were enacted for the purpose of regulating the capture and sale of the animals therein mentioned. We also understand that "pearl fishing" as used in Section 6551, refers to the capture of fresh water mussels such as are described in this case. It therefore appears that the State of Missouri claims the right of regulating the capture of mussels in the public waters of said state. To hold that plaintiff's assignors owned the mussels in controversy would be to decide that said assignors had the exclusive right of fishing in the waters of Little River where these mussels were found. Such a grant would not be presumed in the absence of express words in a grant conveying the exclusive right of fishery. It is very doubtful also as to whether any such grant would be valid under the constitution and laws of Missouri. In the case of Mc-

Kenzies' Executors v. Hulet, 2 Taylor, (N. C. 181) it was decided that a grant of land covered by an arm of the sea only at high water, would entitle the grantee to an action of trespass for taking oysters from the rocks within the grant. The court also said, "The right of taking fish in the sea, or the arms thereof, belongs to everyone as a common — of piscary; but even this may be restrained where an individual hath gained exclusive property. Hale, de Jure Maris, 11. And this may be acquired by grant or prescription. Ibid 43; but it being considered as a royalty, it would not pass without special and express words." 2 Bl. 39. As we understand the record, the grant to plaintiff's assignors did not mention Little River or the waters thereof, neither does it appear from the report of the case above cited what the words of the grant were in that case. The record shows that the lands of plaintiff's assignors were first granted by the United States to the State of Missouri by the Act of Congress approved September 28, 1850, relating to swamp lands, then by the State to the County of Pemiscot, from which plaintiff's assignors obtained their title. We find no reason for holding that plaintiff's assignors had by grant or otherwise an exclusive right of fishery in the waters of Little River at any point. These mussels cannot be separated from the waters of Little River, so far as their ownership is concerned. It it true they were found in the bed of the stream, but they could not live without the stream, and plaintiff's assignors could have
142 no exclusive ownership in them independent of the ownership of the water in the stream. The elementary authorities in our judgment sustain the views above expressed and seem to be in line with the statute of the State of Missouri in regard to the public waters of said State. The term "fish" includes the different kinds of shell fish such as oysters, clams, and lobster. Moulton v. Libbey, 37 Me. 472; Caswell v. Johnson, 58 Me. 164. Note: 60 L. R. A. 516—11 R. C. L. 1015. Fish, generically speaking, on account of their migratory character and want of a fixed habit are classified as animals feræ naturæ. Their ownership while they are in a state of freedom is in the state, not as a proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common, and the ownership thereof may not be claimed by any particular individuals. 11 R. C. L. 1015-1016; State v. Heger, 194 Mo. 711; State v. Weber, 205 Mo. 36.

The difference in the locomotive powers of swimming fish and shell fish, however, justifies a distinction as to their ownership. In their natural state shell fish, like swimming fish, are classified as feræ naturæ and their ownership is vested in the state in its sovereign capacity. 19 Cyc. 988 B; R. C. L. 1017. Oysters and clams, however, which are planted where they do not naturally grow and the location of which is marked by posts or otherwise, are the subjects of private ownership. R. C. L. 1018. In Parker v. The People, 111 Ill. 588, the Supreme Court of Illinois said:

"From the wild and wandering nature of fish they are not, nor can they be, the subject of ownership in running streams, like animals and fowls which have been domesticated. The nature of fish impels

them periodically to pass up and down streams for breeding purposes, and in such streams no one, not even the owner of the soil over which the stream runs, owns the fish therein, or has the legal right to obstruct their passage up or down, for to do so would be to appropriate what belongs to all to his own individual use, which would be contrary to common right, and all having a common and equal ownership, nothing short of legislative power can regulate and control the enjoyment of this common ownership."

143 In Peters v. State, 96 Tenn. 682, the Supreme Court said:

"Fish in streams or bodies of water have always been classed by the common law as feræ naturæ, in which the riparian proprietor or the owner of the soil covered by the water, even though he may have the sole and exclusive right of fishing in said waters, has at best but a qualified property, which can be rendered absolute only by their actual capture, and which is wholly divested the moment the fish escape to other waters."

The above language of the Supreme Court of Tenn. was fully approved in State v. Theriault, 70 Vermont 617.

We are of the opinion that under the facts of this case, the mussels in controversy were animals feræ naturæ, and no private property existed in regard to them while they remained in a state of nature. From the earliest traditions the right to reduce animals feræ naturæ to possession has been subject to the control of the law giving power. Geer v. Conn., 161 U. S. 519-522. Speaking generally and without reference to the rights and legislation of Missouri, the defendants by killing the mussels and reducing them to possession obtained title to the same. 3rd C. J. 18. The plaintiff, however, invokes the rule of the common law that where title to animals feræ naturæ is obtained by taking possession thereof, the taking must not be wrongful and if the taking is effected by one who is at the moment a trespasser, no title to the property is created in him but it vests in the owner of the soil. 3rd. C. J. 20. And as it appears in evidence in this case that the mussels were taken and boiled on the lands of plaintiff's assignors the title to the same vested in the plaintiff as the defendants were mere trespassers. We are of the opinion, however, that whatever might be the effect of the rule stated in general, we think that the legislation of Missouri as hereinbefore quoted would vest the title of the killed mussels in the State and not in the plaintiff. Plaintiff has cited some English decisions as to the right of fishery in the waters of England but the difference as to what are private and public waters in England and the United States make the cases cited inapplicable. The public waters of England so far as the right of fishing is concerned are separated from private
144 waters by the ebb and flow of the tide. This rule has never obtained in this country either as to fishing or as to the navigability of streams. In this country if a stream is navigable in fact it is so in law. Our judgment is that the trial court was right in di-

recting a verdict for the defendants and that the judgment below should be

Affirmed.

It is so ordered.

Filed April 28, 1919.

145 *(Judgment, April 28, 1919.)*

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1918.

Monday, April 28, 1919.

No. 5285.

BENJAMIN GRATZ, Plaintiff in Error,

vs.

JAMES S. MCKEE, NELLIE CANON BLIVEN, Executrix of William E. Bliven, Deceased; MCKEE and BLIVEN BUTTON COMPANY.

In Error to the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that James S. McKee, Nellie Canon Bliven, executrix of William E. Bliven, deceased, McKee and Bliven Button Company have and recover against Benjamin Gratz the sum of twenty dollars for their costs herein and have execution therefor.

April 28, 1919.

Vacated November 17, 1919.

E. E. KOCH,
Clerk.

146 United States Circuit Court of Appeals, Eighth Circuit.

No. 5285.

BENJAMIN GRATZ, Plaintiff in Error,

vs.

JAMES S. MCKEE et al.

Petition for a Rehearing.

A rehearing is earnestly urged by plaintiff in error. The brevity of this Petition should not indicate any want of zeal or imply any

absence of respectful conviction of prejudicial error. But we hope for same to be read and considered; hence it will be as short as circumstances allow.

Before our grounds are stated, an outline of the case decided will be set down here to refresh your Honor's remembrance of it.

The Case.

307½ tons, or 615,000 pounds, of shells, used in the manufacture of buttons, were taken and shipped by trespassing defendants from mussels dug out of the (non-navigable) water of the swamp lands, belonging to plaintiff's assignors, in Pemiscot county, Missouri; and this action, for damages for the conversion of said shells, was brought. "A shell is comprised principally of lime; about ninety-five per cent lime" (Tr. 45).

The opinion of this Court holds that the law recognizes no property right in the mussels; and that whatever title to said mussels might have existed was in the State of Missouri. Therefore, it was ruled that no case, for conversion of the shells, was made out.

Plaintiff in error, by counsel, respectfully petitions for a rehearing because:

147 I.

The Court treated the cause as one to be determined by principles governing the ownership of wild animals (damages for taking which are not claimed) instead of by principles determining the ownership of a recognized and well established article of commerce—the said shell—out of which the button is manufactured, and for conversion of which, alone, damages are sought.

Defendants, trespassers, "dug" the mussel out of the mud of the private swampy lands in question and then (on the same lands) boiled and separated the mussel from the shell and thereupon piled and stored the latter (for from 10 days to a month, Tr. 36, 47) on said lands until the said shells were later on hauled away from said lands and shipped to Muscatine, Iowa.

It is respectfully submitted that there can be no more support for holding that the property right in this shell, in these circumstances, is determined by the ownership of the live or dead mussel than there would be for denying to the individual owner of a dry farm in that county the right of property in the bones of a dead buffalo killed thereon by a marauding Indian in pioneer days.

And yet the decision of this case has been allowed to turn by a failure to take into account this distinction; although same was duly referred to in the original brief.

148 II.

The learned opinion inadvertently omits to apply a decisive proposition of law that forbids the conclusion that the State had title to these shells.

The land owner's possession, and right to the possession, of said shells, as against one who had no possession, or no better right, is (in and of itself) sufficient to support this action for conversion.

Here, the private land owner not only exhibited perfect legal title to every square inch of these swamp lands (Tr. 27-31) but was in the actual possession thereof, and of all thereon, through the agent Warren (Tr. 120). The trespassing defendants (even after being refused permission) entered and violated that possession, dug and boiled the mussels and, thereafter, took away the shells in question from said lands and manufactured them into buttons.

In view of these facts, no inquiry, in this action, into the title to the shells can properly arise or be material. Defendants not only had no better title to the mussels (or shells) than the land owner, but said defendants had no title whatever, while the (possessing) land owner even went so far as to prove his title. Surely, there is in this case no occasion or warrant for an adjudication of title in the State or in any other third party.

Armory v. Delamirie (Smith's L. Cas.) 1 Str. 504.
United States v. Loughrey, 172 U. S. l. c. 219.

Possession is a good title against all the world, except as against those having a better title.

20 Viner, Abr. 278.

When this principle is applied a different judgment is arrived at.

149

III.

The pleadings do not allow the result. The petition, answer and reply treat the question of property right just as if the article taken had been so much coal or timber. There was no plea such as liberum tenementum, under which title to the shells might have been ruled to be in the State, or by virtue of which the defendants could be said to have had the license, or acquittal, that the opinion in effect sanctions.

This proposition was duly argued; but was inadvertently overlooked. It is important. We hope same will be given consideration.

IV.

The owners of the swamp lands in question (we respectfully contend) have the exclusive right of fishing in all of the waters thereon.

This important proposition is ruled adversely in the learned opinion; but it seems that the Court is under a misapprehension of the facts which we will, in as short compass as possible, endeavor to make clear.

The following observations appear on page 4 of the opinion:

"We find no reason for holding that plaintiff's assignors had by grant or otherwise an exclusive right of fishery in the waters of Little River at any point."

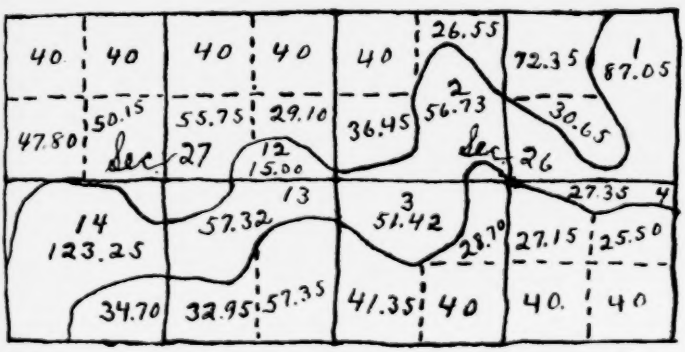
And, also (p. 4):

"As we understand the record, the grant to plaintiff's assignors did not mention Little River or the waters thereof * * * "

150 Certainly not! For the very thing that the grant granted was the so-called river which was surveyed by the Government, and patented, just like so much farm land, without recognizing, in any way, the existence of the waters or the swamps thereon. Had the Government, in its survey in that locality, mentioned or otherwise recognized "Little River" as a stream of water that very fact would have given to such stream the public character that the opinion mistakenly assumes it has and, also, would have resulted in the Government's withholding the title thereof, instead of conveying the same, as was done.

These swampy lands (in which is the "river") are described in the petition (Tr. 14) by lot numbers which is the Government's designation thereof and which is as precise as a description by metes and bounds. A perfect fee-simple title in the plaintiff was proven (Tr. 27-31) and is not questioned.

The following is an accurate tracing of a small portion (sections 26 and 27, Township 20, North, Range 11, East) of one of the photo-lithographic plats (Tr. 27-8) in evidence as exhibits, and is inserted here for clarity and better explanation:



151 This is typical of the surveys in both Townships; and, on pages 27 and 28 of the Transcript, an explanation of said exhibits appears.

Your Honors will observe therefrom that every foot of this land, lying between the meander lines, has been surveyed by the Government into various lots, with designated acreages in each lot, and that the channel or thread of said alleged river (which is somewhere between those meander lines) is not marked or shown or recognized by the survey or otherwise.

All of this land (between said meander lines) is the land of plaintiff's assignors; and from all of the swampy places, in this land, the mussels were taken, and the shells piled up in heaps on the contiguous portions thereof that were then dry.

The authorities cited in the brief and reply brief (including Hardin v. Jordan, 140 U. S. l. c. 388-9) as well as the nature of the grant of these lands and the character of the waters thereon, clearly demonstrate that there exists an exclusive right, in the land owner, of fishing on said lands.

In fact, it is a matter of large notoriety in Missouri (and see Tr. p. 32) that artificial ditches have been made on these very lands and that, in so doing, the waters thereon (including those of the so-called river) have been devoted to a comprehensive scheme of artificial drainage—a course altogether inconsistent with any fishing or other rights in the public or any citizen other than the plaintiff's said assignors, the owners of said lands.

Not only are said owners' fishing rights exclusive, but their rights as holders of the fee, are complete and exclusive in every other particular also.

152 And these rights are just as exclusive in the said waters as in the fish, except only that said waters may not be polluted or turned out in unusual quantities or dammed back, to the consequent damage of adjoining land owners.

V.

The opinion classifies the mussel as a fish and a fish, in its natural state, as an animal feræ naturæ. The learned opinion recognizes the law to be that where a trespasser kills or reduces an animal feræ naturæ to possession, the same thereupon becomes the absolute property of the owner of the land on which it was so killed or reduced to possession by such trespasser; but the following ruling (page 6) we respectfully and seriously contest:

"We are of the opinion, however, that whatever might be the effect of the rule stated in general, we think that the legislation of Missouri as hereinbefore quoted would vest the title of the killed mussels in the State and not in the plaintiff."

Aside from the distinction between the mussels and the shells and assuming that any possible interest of the State in this matter could affect the decision of this case, we earnestly submit that the Court is in error in the foregoing statement.

We must not consume space by copying in this petition the two sections (6508 and 6551) of the Missouri statutes, quoted in the learned opinion (p. 3), and upon the supposed meaning of which this ruling was announced.

153 We originally contended, and yet respectfully insist, that the legislation of that State has for its sole aim and purpose the regulation of the capture and disposition, and the preservation of the game and fish therein mentioned; and that, in no sense, has

hat State (or any other State we know of) ever had, claimed or as-erted title to or ownership of any fish or game, on the lands of the itizen, in the sense in which the words "title" and "ownership" are mportant in this action for conversion.

And on page 5 of the learned opinion, your Honors, in one place, appear to agree with us:

"Their ownership [i. e., animals *feræ naturæ*] while they are in a state of freedom is in the State, *not as a proprietor*, but in its sovereign capacity as the representative and for the benefit of all its people in common, and the ownership thereof may not be claimed by any particular individuals." (Italics ours.)

The effect of said legislation (which is common to most if not all of the States) on the precise question in hand appears to have been directly considered in only two cases, both of which are reported in Ruling Case Law and elsewhere as leading cases, but neither of which is referred to in the opinion although same were duly cited originally. They are these:

State v. Mallory, 73 Ark. 236, 83 S. W. 955.
Schulte v. Warren, 218 Ill. 108, 75 N. E. 786.

These authorities are persuasive of the proposition that the State has no owner's-interest in said shells or in said mussels. We hope that same may be given the consideration they merit.

154 The State's police-power-interest and the individual's private-property-ownership are fully discussed and contrasted in the Mallory case, above, and the two are held to be in no wise inconsistent; the Court there saying:

"But nowhere do we find that in modern times has the absolute and unqualified ownership of such animals (feræ naturæ) by government been asserted and exercised further than for the purposes of controlling and regulating the taking of the same. On the other hand, we find frequent denial of the right of government to do more." * * *

"We assume, therefore, as firmly established by authority, that the State's ownership of fish and game is not such a proprietary interest as will authorize a sale thereof, or the granting of special interests therein or license to enjoy, but is solely for the purposes of regulation and preservation for the common use, and is not inconsistent with a claim of individual or special ownership by the owner of the soil, if it be found that there can be any such individual or special ownership. We next inquire whether the owner of lands in the State has any title to, or property rights in, the fish and game thereon."

That Court then proceeds to answer this last question in the affirmative. Its opinion contains an exhaustive review of the authorities (including those cited in the present learned opinion) on the identical propositions of law raised here. We must not take more space to quote therefrom but we sincerely hope your Honors will read same. We are convinced that, upon further examination, you will

regard that opinion as sound upon authority and its doctrine
155 as decisive of the case at bar.

The Supreme Court of Illinois, in Schulte v. Warren, above, has concurred in and adopted the above mentioned declarations of law so fully and clearly laid down by the Supreme Court of Arkansas in the Mallory case just referred to. In fact, the law as declared in Illinois applies the stated principles even to waters that are navigable, where the bed and banks are privately owned; but we hesitate to extend this Petition with more comment on these rulings and content ourselves in the hope that same will be duly considered.

The cases in Missouri do not determine the point here in question although there may be found in them a plain recognition of the validity of our contention concerning the individual's property right in fish and game on his private premises, as against any claim of proprietary interest by the State.

State v. Blount, 85 Mo. 547
State v. Weber, 205 Mo. l. c. 46-7

The land owner has the right to reduce his fish and game to possession and, as is expressly ruled in the Blount case, above, this property "is not taken away by the statute."

Furthermore, said statute (sec. 6508) refers expressly and only to such game and fish as are "not now held by private ownership." Same was enacted in 1909 (See Laws of Mo., 1909, p. 519). The lands in question became private lands, "held by private ownership" on May 8, 1900, and Nov. 9, 1903 (See Exhibits 7 and 6, Tr. p. 30). Hence, by its express terms, the statute does not apply in this case.

156 Moreover, the trespassing defendants were and are residents and citizens of Iowa; and it certainly cannot be that the State of Missouri has asserted any concern it may have in its fish and game for the benefit of non-residents and to the detriment of its own citizens.

Section 6551 of said statutes, regulating "pearl fishing," only makes it unlawful to engage in such fishing during the months of March, April, May and June. This law was not violated in the present case for the mussels were taken in July, August, September and October (Tr. 33). The State of Missouri was not, therefore, interested at the time in these mussels, even in its sovereign capacity or in any governmental sense.

Lastly, sections 6548 and 6522 of said statutes (quoted, reply brief, pps. 2-3, but not considered in the opinion) confirm our contention as to the extent of the State's concern and interest in the said mussels.

We earnestly request another hearing on the question of the State's supposed title to the shells in question.

VI.

Mussels, we respectfully contend, are not properly classified as wild animals. They should be treated the same as oysters, so far as class-

fication goes, and property rights therein determined as in tame, or domestic, animals.

State v. Taylor, 27 N. J. Law 119, 72 Am. Dec. 347.

Fleet v. Hegeman, 14 Wend. (N. Y.) 42 [by Judge, later Mr. Justice, Nelson.]

157 These appear to be the only authorities dealing with the precise question, and we hope to have them considered. The ruling they announce certainly seems to have support in reason; and, if accepted by this Court, the question of the land owner's property right in mussels, and therefore in the shells thereof, answers itself. We earnestly pray a rehearing. Much of the authority and argument for the plaintiff in error that this Court seems to have inadvertently overlooked, we attribute to our failure heretofore to have been clearer. The foregoing is abbreviated as much as possible in our endeavor to correct the asserted errors herein pointed out and in our effort to vindicate a valuable property right as against the flagrant violation thereof by wilful, non-resident, trespassers who should not, if possible, be permitted to enjoy the fruit of what the learned opinion appears in part at least to concede was a wrongful act.

Respectfully submitted,

S. MAYNER WALLACE,
SHEPARD BARCLAY,
Attorneys for Plaintiff in Error.

St. Louis, Mo., June 26, 1919.

158 *Certificate of Counsel.*

The undersigned, counsel for plaintiff in error, Benjamin Gratz, hereby certify that in our opinion the foregoing Petition for a Rehearing is well founded in each of the points of law stated; that said Petition is not interposed for delay, but is presented and filed in good faith because we believe that a Rehearing of this case ought to be granted and that a grave and irreparable injustice will result to the plaintiff in error and his said assignors if this Petition is denied, or overruled.

S. MAYNER, WALLACE,
SHEPARD BARCLAY,
Attorneys for Plaintiff in Error.

St. Louis, Mo., June 26, 1919.

(Endorsed:) Filed in U. S. Circuit Court of Appeals. June 26, 1919.

159 (*Order, November* 17, 1919, *Granting Petition for Rehearing, Vacating, Judgment of April* 28, 1919, *and Restoring Cause to Docket for Reargument.*)

September Term, 1919.

Monday, November 17, 1919.

This cause came on this day to be heard upon the petition for a rehearing, filed by counsel for plaintiff in error.

On consideration whereof, it is now here ordered by this Court that said petition for a rehearing of this cause, be, and the same is hereby, granted; and that the judgment of this Court entered on the 28th day of April, 1919, in this cause, affirming the judgment of the said District Court, be, and the same is hereby, vacated, set aside and held for naught, and that this cause be now restored to the docket under its former number and assigned for reargument at the foot of the call for Wednesday, January 14, 1920, at the December Term, 1919, with leave to the parties, or either of them, to file further and additional briefs herein should they, or either of them desire to do so.

November 17, 1919.

(*Order, January* 14, 1920, *Passing Case to Foot of Call for January* 15, 1920.)

December Term, 1919.

Wednesday, January 14, 1920.

This cause having been called in its regular order, it is now passed to the foot of the call for Thursday, January 15, 1920, following the cases now assigned for that day, owing to the illness of counsel for appellees.

160 (*Order of Resubmission, January* 19, 1920.)

December Term, 1919.

Monday, January 19, 1920.

This cause having been called for hearing in its regular order, reargument was commenced by Mr. S. Mayner Wallace for plaintiff in error, continued by Mr. Lon O. Hocker and Mr. William H. Hoffman for defendants in error and concluded by Mr. S. Mayner Wallace for plaintiff in error.

Thereupon, this cause was resubmitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

61 (*Opinion, November* 13, 1920.)

United States Circuit Court of Appeals, Eighth Circuit,

September Term, A. D. 1920.

No. 5285.

BENJAMIN GRATZ, Plaintiff in Error,

vs.

JAMES S. MCKEE et al., Defendants in Error.

n Error to the District Court of the United States for the Eastern District of Missouri.

Mr. S. Mayner Wallace (Mr. Shepard Barclay on the brief), for laintiff in error.

Mr. Lon O. Hocker and Mr. William H. Hoffman (Messrs. Hoffman & Hoffman and Messrs. Jones, Hocker, Sullivan & Angert on he brief), for defendants in error.

efore Hook and Carland, Circuit Judges, and Van Valkenburgh, District Judge.

VAN VALKENBURGH, District Judge, delivered the opinion of the ourt.

Plaintiff in error, plaintiff below, sued the defendants in error, efendants below, to recover the value of 307½ tons of mussel shells lleged to have been taken from the lands of plaintiff's assignors, and onverted to defendants' use. The trial court directed a verdict for he defendants, which judgment was affirmed by this court. (258 ederal 335.)

The plaintiff invoked the rule of the common law, that where title o animals feræ naturæ is obtained by taking possession thereof, the taking must not be wrongful and if the taking is effected by
62 one who is at the moment a trespasser, no title to the property is created in him but it vests in the owner of the soil. This ourt was of opinion, however, that whatever might be the effect of his rule in general, the legislation of Missouri (R. S. Mo. Sections 508, 6551) vested the title of the killed mussels in the state and not n the plaintiff, and for this reason, the rule stated could not aid the laintiff (258 Federal 339).

Upon petition for re-hearing, the court being of opinion that the uling upon this point involved doubt sufficient to warrant re-argument and re-submission, the petition for re-hearing was granted.

The main facts are so substantially stated in the former opinion hat extended repetition is unnecessary. Such additional references o the record as may be essential to clearer understanding of the oints ruled will be made in the course of the opinion.

We adhere to the conclusion originally reached that the fresh water mussel is a shell fish capable of locomotion, in a most limited degree to be sure, but sufficient to bring it within the category of migratory fish. That as such, it cannot be deemed part of the realty within R. S. Mo. 1909, par. 5448, allowing treble damages in certain cases for digging up and carrying away any substance or material being a part of the realty. The rules laid down in certain cases respecting oysters, also shellfish, are not applicable here, because these mussels were neither planted nor confined in any manner prescribed to create a special private ownership in them as such. Furthermore, the fact that they were taken, not for food, but for the commercial value of their shells, cannot avail the plaintiff. The shells do not differ in principle from the pelts of fur-bearing animals, which are hunted and caught for these alone, and not for any other useful purpose. While in all the particulars named the subject-matter of this controversy lies extremely close to the border which separates diverging lines of judicial decision, nevertheless the law must be applied with strict reference to the actual legal status involved.

It is conceded that plaintiff's assignors own the land through which Little River flows, and from which these mussels were taken. Therefore, it had title not only to both banks, in so far as any banks are defined, but likewise to the soil underlying the bed of the stream.

These lands were selected and conveyed as swamp or over-
163 flowed lands. It appears from the record that they consist of a swampy tract, through which, during most of the year, there is little or no well-deefined stream or current; the so-called river resolving itself rather into pools along its course. During periods of high water the semblance of a river is more apparent. It is at those times, and, perhaps at all times, in some places, susceptible of being used in a very limited way for floatage, or by small row boats or dugouts for the convenience of those living in the vicinity. As stated by the record:

"At times people rafted and floated logs for saw-mills on Little River. It was only at different times they did that; when there was a saw-mill on the bank of the river there, and when the stage of the water was high enough they floated logs for the mill by way of the river. * * *

"The stream was used for small craft, small boats and dugouts, to carry provisions and things of that kind. The roads were not particularly good in that country at different seasons of the year. When the river was high the roads would be pretty bad from the water. The principal transportation there would not be by the river, for people going back and forth; but the individuals used it, whenever they saw fit, to carry things. If they wanted to go up or down the river and carry a little amount, probably they would go in boats. If they lived on the river they would carry anything to their homes back and forth, that way. * * *

"It was just a low swamp first on the one side and then on the other, with a little meandering channel, small meandering channel, probably fifty or a hundred feet. It meandered diagonally from

the northeast to the southwest across this territory by maybe two townships. Quite a good many logs were floated down it. At Wardell there was a saw-mill; two that I know of. The river was the only way of travel for a good part of the time, in boats. The roads in that country was so poor that you couldn't go with wagons. During wet weather the condition of the roads was bad; muddy. People would go from place to place in little dugouts. A 'dugout' is a log split in two and carved out like a half watermelon. Things were carried in the dugouts, groceries and supplies of all kinds; and occasionally make a trip across the swamp over to the mills; take milk or corn in the dugout and go across to a place where they got a farmer to haul their stuff to Kennett."

164 In its former opinion the court found the stream to be "non-navigable except in a very restricted sense". Counsel for defendants in their brief admit that the river is not navigable in the full sense of that term, but assert that it is capable of a public use for rafting, floating logs, and for navigation in small boats. Upon a full consideration of the record, we are of opinion that the river is non-navigable in any sense that would constitute it a part of the public waters of the state. Harrison v. Fite, (C. C. A.) 148 Fed. 781.

"A stream is navigable in fact only where it affords a channel for useful commerce and of practical utility to the public as such. The fact that there is water enough in places for row boats or small launches, answering practically the same purpose, or that hunters and fishermen pass over the water with boats ordinarily used for that purpose, does not render the waters navigable". (Schulte v. Warren, 218 Ill. l. c. 119).

It is held that navigable waters must be capable of practical general uses. (Hubbard v. Bell, 54 Ill. 110).

"If its location is such, and its length and capacity so limited, that it will only accommodate a few persons, it cannot be considered a navigable stream for any purpose. It must be so situated, and have such length and capacity, as will enable it to accommodate the public generally as a means of transportation". (Griffith v. Holman, 23 Wash. 347).

To the same effect is the great weight of authority. (Rowe v. Granite Bridge Corporation, 21 Pick. 344; Nutter v. Gallagher, 19 Ore. 375; Haines v. Hall, 17 Ore. 165; Burroughs v. Whitwam, 59 Mich. 279; Wethersfield v. Humphrey, 20 Conn. 218; Ricks Water Co. v. Lumber Co., 107 Cal. 221; Olive v. State, 86 Ala. 88; Morrison Bros., 87 Ala. 655).

The decision must rest upon the special facts in each case, and in this state is said generally to be one for the jury. (Weller v. Missouri Lumber & Mining Co., 176 Mo. App. 243).

But even though this so-called river be regarded as navigable, in this very restricted sense, for small uses in the floatage of logs and for skiffs and dugouts during high water when the roads are bad,

as is usual in most swampy and over-flowed districts, never-
165 theless such local, limited and intermittent forms of use cannot transform waters otherwise non-navigable into navigable streams nor catalogue them among the public waters of the state; and the use which any person may lawfully make of such waters is limited to such incidental right of floatage or qualified navigation.

"There is a manifest difference between public streams that can be used successfully for the running of boats and vessels for the purpose of commerce and those which are only capable of being used for the floatage of lumber and logs in rafts or single pieces. The riparian owners are entitled to the beneficial and sole use of the latter streams, except for floatage; and when such streams have become unfitted for valuable public use, and have actually ceased to be used for public highways, there is no more reason for holding them to be public than in the case of a land highway which has been abandoned and is useless." City of Grand Rapids v. Powers, 89 Mich. 94; Sterling v. Jackson, 69 Mich. 488; Hall v. Alford, (Mich.) 72 N. W. Rep. 137.

In the case at bar the mussels were taken from the stream in the following manner:

"At Wardell they were taken principally with tongs, a kind of what they call an oyster fork. It has a handle and they go together like that (illustrating) and they raise them up. The water there was most favorable for using tongs. During the real low stages they waded and got them out. I would say that the principal part of them were taken with tongs. The shells can be taken with tongs very nicely in anything up to about twelve feet of water. In 1913 and 1914 Little River was very crooked; a very crooked stream; lots of deep short bends in it, and there was quite a variation in the depth. Some places were considerably deeper than others, and they would be right close together, too. It seemed to run off in holes. It was a very swampy stream; that is, it ran out flat, and there was growth in the stream, trees. In certain places this swampy condition existed on either side of the channel. * * *

After the mussels were dug, they were boiled out by the diggers, on the banks of the river, generally, where they are taken, or very close. The meat was taken out of the shells and they were prepared for market. * * * Under ordinary conditions
166 during the summer and working season, I don't think the shells would be on the bank over two or three weeks." (Testimony of witness McClung.)

"The way that I dug shells was to go out in the water and pick them up by hand, with my fingers. I could not see them; I had to feel for them; the water was muddy. A part of them would be almost buried in the mud. I have been acquainted with the mussel down there all my life. In digging shells down there, other people used forks, something like a potato fork, that had eight or nine prongs to it. They would fork them that way. And the other way they had tongs, something like those tongs used in digging up snails.

They would fork them in deep water where they couldn't reach them any other way. * * *

The length of time a pile remained on the bank before being hauled would depend on getting cars; sometimes from ten days to a month. (Testimony of witness Hickerson.)

In the brief of defendants' counsel it is said:

"The method is either to wade in the stream at low tide, or go in boats in high water, and by means of hooks or other devices take the mussels from the bed of the stream."

It is apparent that the mussels were taken by those who went upon the land of plaintiff's assignors expressly for that purpose; that they were taken indiscriminately either by waders, who picked them out, or dug them out with forks, or from boats in places where the water happened to be too deep for wading. The shells were then piled upon the banks or higher ground, also belonging to plaintiff's assignors, where they remained for periods ranging from ten days to a month, and were thence hauled to the railroad for shipment. All these unlicensed acts were trespasses.

The decision of this case, it would appear, must rest upon the determination of title and ownership, if any, to which the plaintiff in this case has succeeded. Under the common law as it has existed, and still exists, in England, and generally as transmitted to the states of the union, modified by statutory enactment and supplemented by usage, the owner of the soil would have a qualified, but substantial, property interest in the fish upon his own land, with the exclusive right to reduce it to possession superior to that of
167 others, and subject only to regulation by the state as a sovereign and under its police powers. State v. Mallory (Ark.) 83 S. W. Rep. 955; Hall v. Alford (Mich.) 72 N. W. Rep. 137; Payne v. Sheets, 75 Vt. 335; Peters v. State, 96 Tenn. 682; Lincoln v. Davis, 53 Mich. 375; Sterling v. Jackson, 69 Mich. 488; Schulte v. Warren, 218 Ill. 108; Realty Company v. Johnson, 92 Minn. 363; Cobb v. Davenport, 33 N. J. Laws 223; Kellogg v. King, 114 Cali. 378.

The rule is well and comprehensively stated by the Supreme Court of Arkansas in State v. Mallory, supra:

"It is insisted that these questions generally arise in suits between individuals, involving only individual rights, and that the recognized right to take game on one's own land, and to prevent others from so doing is merely a right to prevent a trespass on the land, and not a right of property growing out of the soil. But this is not a correct estimate of the force of these authorities, for the cases all hold that it is a right inhering in the soil, and not a mere right to prevent an invasion of the possession of the owner. * * *

"We therefore conceive it to be settled by authority and by long recognition in the law that the owner of land has a right to take fish and wild game upon his own land, which inheres in him by reason of his ownership of the soil. It is a property right, as much as any

other distinct right incident to his ownership of the soil. It is not, however, an unqualified and absolute right, but is bounded by these limitations: That it must always yield to the state's ownership and title, held for the purposes of regulation and preservation for the public use. These two ownerships or rights—that is to say, the general ownership of the state for one purpose, and the qualified or limited ownership of the individual, growing out of his ownership of the soil—are entirely consistent with each other, and in no wise conflict. The transitory nature of the property renders the benefits so diffusive that all may join in the enjoyment thereof, and for that reason the sovereign holds as the representative of the public, so as to regulate and protect the common use. Still the right of the landowner to hunt and fish on his own lands is to that extent a special property right, though subordinate to the other."

It is true that unqualified ownership becomes complete only when the fish or animal is reduced to possession by capture in conformity with state regulation. These mussels have been so reduced to
168 possession, and the question presented is, to whom does the title inure? To the trespasser who took them, or to the owner of the soil whose rights have been invaded? If our conception of the relationship of the parties and of the rights of the owner of the land is correct, then the rule of law widely prevailing in this country is not different from that obtaining in England, and that is that:

"Title to property created merely by the act of reducing a thing into possession, necessarily implies a reduction into possession effected by an act which is not in any way of a wrongful nature. Such an act, therefore, effected by one who is at the moment a trespasser, cannot create a title to property."

In such case, the title inures at once to the owner of the land. Blades v. Higgs, 11 H. L. C. 621; State v. Repp, 104 Ia. 305; Brown v. Eckes, 160 N. Y. Supp. 489; Harper v. Galloway, 58 Fla. 255; Commonwealth v. Chace, 9 Pick. 16; Lonsdale v. Rigg, 11 Exch. 654; Rexroth v. Coon, 15 R. I. 35; State v. Mallory (Ark.) 83 S. W. Rep. 955; Schulte v. Warren, 218 Ill. 108, 122.

It would seem, therefore, that the plaintiff should prevail in this action, unless the Statutes of Missouri, relating to fish and game, have diverted the current of the law from its accustomed channel and extinguished the rights which otherwise would be his. This court, in its original opinion, adopted this view, but misgivings upon this vital point caused this re-hearing to be granted.

It is necessary to consider only section 6508, which reads as follows:

"The ownership of and title to all birds, fish and game, whether resident, migratory or imported, in the State of Missouri, not now held by private ownership, legally acquired, is hereby declared to be in the state, and no fish, birds or game shall be caught, taken or killed in any manner or at any time, or had in possession, except the person so catching, taking, killing or having in possession shall consent that

the title of said birds, fish and game shall be and remain in the State of Missouri, for the purpose of regulating and controlling the use and disposition of the same after such catching, taking or killing.

169 The catching, taking, killing or having in possession of birds, fish or game at any time, or in any manner, by any person, shall be deemed a consent of said person that the title of the state shall be and remain in the state, for the purpose of regulating the use and disposition of the same, and said possession shall be consent to such title in the state."

This section in its present form first appears in the Session Acts of Missouri for 1905, at page 159, and was approved March 10th of that year. As interpretive of its meaning but four Missouri cases are cited by counsel. (State v. Blount, 85 Mo. 543; Haggerty v. Ice Mfg. & Storage Co., 143 Mo. 238; State v. Heger, 194 Mo. 707; State v. Weber, 205 Mo. 36.)

And no others bearing with appreciable directness upon the point in question have been brought to the attention of the court. State v. Blount was decided in 1885, and had under consideration section 1625 R. S. 1879, prohibiting seining and netting of fish in any of the waters of the state under certain conditions and subject to certain exceptions. The case arose prior to the enactment of section 6508 supra; but the court had under consideration the extent of the sovereign power of the state over fish, and announced the right of the individual landowner under the legal exercise of that sovereign power as it was then deemed to exist. The court said:

"The property which a man hath in animals, feræ naturæ, is a qualified property; that is, he may have the privilege of hunting, taking and killing them on his own premises, to the exclusion of others. He has but a transient property in these animals, usually called game, so long as they continue within his premises. 2 Black Com. 394. This qualified, transient property, is not taken away by the statute. One who may have the right to take fish from such waters as are specified in the statute, is not denied the right to do so, but, in order to the preservation of fish and prevent their destruction, the state, in the exercise of its police power, simply forbids them from being taken by the use of certain prohibited methods. He can exercise such right in any other method than those which the statute prohibits."

170 This accords with the great weight of authority in other jurisdictions to which reference has been made. The opinion in State v. Heger, supra, at page 711 contains the following statement which is supposed to uphold the contention of the defendants herein:

"The authorities are uniform in holding that the absolute ownership of wild game is vested in the people of the state, and that such is not the subject of private ownership. As no person has in such game any property rights to be affected, it follows that the Legislature, as the representative of the people of the state, and clothed by them with authority to make laws, may grant to individuals the right

to hunt and kill game at such times, and upon such terms, and under such restrictions as it may see proper, or prohibit it altogether, as the Legislature may deem best."

This declaration is expressly based upon the following decisions: (Haggerty v. Ice Mfg. & Storage Co., 143 Mo. 238; Geer v. State of Connecticut, 161 U. S. 519; American Express Co. v. People, 133 Ill. 649; Ex parte Maier, 103 Cal. 476; State v. Rodman, 58 Minn. 393; Magner v. People, 97 Ill. 320; Phelps v. Racey, 60 N. Y. 10.)

All of these cases, including those first above cited, were dealing either directly or indirectly with the effect and enforcement of statutes of regulation as between the state and the individual, and had not under consideration comparative rights of property between individuals, subject, of course, to such right of regulation. And as was well said in State v. Mallory, supra, the language of the courts in those cases must be limited to the question under consideration, as must always be done when testing the soundness of a declared doctrine. Furthermore, the Supreme Court of Illinois, in Schulte v. Warren, 218 Ill. 122, expressly recognizes a qualified right of property in wild animals and birds as between the owner of the land on which they are found and a trespasser thereon; as also does the Supreme Court of Minnesota in Realty Company v. Johnson, 92 Minn. 363, and the Supreme Court of California in Kellog v. King, 114 Cal. 378. And nothing in Geer v. Connecticut is inconsistent with this doctrine. In Haggerty v. Ice Mfg. & Storage Co., State v. Heger and State v. Weber, supra, no purpose is disclosed of overruling the doctrine announced in State v. Blount. It must be assumed, therefore,
171 that the absolute ownership declared in State v. Heger, supra, is identical with that declared from earliest times to inhere in sovereignty for the common benefit, which has never been supposed to be inconsistent with a qualified special property right of the landowner as against trespassers.

It is our duty to interpret statutes in accordance with their true spirit and purpose so far as may be consistent with the language employed. Section 6508 contains striking internal evidences that the title declared was assumed for the sole purpose of regulation and control for preservation, propagation and protection, and not otherwise to determine the beneficial use and ownership. It says so substantially, not once, but twice, in this same section of thirteen lines. Our view is that this enactment is a statute of regulation pure and simple, and leaves private ownership unimpaired except as to the right of the state to prescribe the seasons and conditions under which fish and wild game can be taken, used and disposed of. It is but declaratory of the title of the state and the law applicable thereto as it already existed. There is nothing in the decided cases that combats this view, but much that supports it.

It follows, from what has been said, that the judgment below should be reversed and the case remanded for a trial anew in accordance with the principles announced in this opinion. Those from whom the defendants procured these mussels went wrongfully upon the premises of plaintiff's assignors, and by wading, or from

boats produced for no other purpose, dug from the soil beneath these waters, upon private lands, over three hundred tons of mussel shells, to which they had no title, and to which plaintiff's assignors had title, subject only to the right of regulation of the state. While it is desirable to preserve to the people at large all the rights of hunting and fishing to which they are legally entitled, it is equally necessary that such privileges should not be so extended as to destroy the still more sacred rights of private property to which our form of government is unalterably dedicated.

In as much, however, as it appears that the trespass was not willful in a legal sense, but in a belief of right under a mistaken interpretation of the game laws of the state, and in as much further as the property taken cannot be deemed part of the realty within
172 the meaning of the laws in such cases made and provided, the recovery should be limited to the actual value at the time of the conversion, as disclosed by the evidence, instead of that of the manufactured product, and treble damages cannot be sustained under section 5448, R. S. Mo. 1909.

Filed November 13, 1920.

173 (*Judgment, November* 22, 1920.)

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1920.

Monday, November 22, 1920.

No. 5285.

BENJAMIN GRATZ, Plaintiff in Error,

vs.

JAMES S. MCKEE, NELLIE CANON BLIVEN, Executrix of William E. Bliven, Deceased; MCKEE and BLIVEN BUTTON COMPANY.

In Error to the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that Benjamin Gratz have and recover against James S. McKee, Nellie Canon Bliven, executrix of William E. Bliven, deceased, McKee and Bliven Button Company the sum of—Dollars for his costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to said District Court with directions to grant a new trial in

accordance with the principles announced in the opinion of this Court.

November 22, 1920.

174 In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 5285.

BENJAMIN GRATZ, Plaintiff in Error,

v.

JAMES S. MCKEE et al., Defendants in Error.

In Error to the District Court of the United States for the Eastern District of Missouri.

Petition of Defendants in Error for Rehearing.

Now come the defendants in error in the above-entitled cause and respectfully pray the Court to grant them a rehearing herein, for the following reasons:

1. Although the Court recognizes that the owner of property has only a qualified right of property in wild animals as between him and trespassers upon his land, yet it permits recovery as for conversion against a non-trespasser instead of holding that the
175 owner of the land can maintain only an action quare clausum fregit against those who actually trespassed upon his land.

2. Because the decision of the Court is contrary to the law of Missouri in this, that by Section 1 of Article I of the Constitution of Missouri it is provided that "the river Mississippi and the navigable rivers and waters leading to the same shall be common highways and forever free to the citizens of this State and of the United States" and it is the law of Missouri that waters capable of "floating or other navigation periodically during the year" are navigable streams within the provisions of the Constitution of the State of Missouri, and also because the decision is contrary to the construction placed upon its statutes by the courts of Missouri.

3. Because it has always been the recognized custom of the citizens of Missouri to fish in streams of the character here involved, such as the Saint Francis, the upper waters of the Black, the upper waters of the Current, Jack's Fork, Gasconde, the Big Piney, Meramec, Eleven Point, and Bourbois, none of which are of such size as to exclude the bed of the stream from private ownership, which custom is so strongly established that no one has ever had a thought that by going upon such waters and taking fish therefrom he was committing a trespass.

Wherefore, defendants in error pray that a rehearing be granted in this cause.

LON O. HOCKER,
FRANK H. SULLIVAN,
Counsel for Defendants in Error.

176 We, Lon O. Hocker and Frank H. Sullivan, do hereby certify that we are attorneys for the defendants in error in the above-entitled cause; that we have read the foregoing petition for rehearing and believe that it is well founded in point of law; and that the same is not presented merely for the purpose of delay.

LON O. HOCKER.
FRANK H. SULLIVAN.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 13, 1921.

177 United States Circuit Court of Appeals, Eighth Circuit.

No. 5285.

BENJAMIN GRATZ, Plaintiff in Error,

vs.

JAMES S. MCKEE et al.

Petition for Modification of Opinion or Rehearing.

We respectfully urge a modification of the (last paragraph of the) learned opinion, or a rehearing on the question of the measure of damages referred to therein.

We do not now further urge the supposed applicability of Section 5148 of the (1909) Mo. Statutes, allowing treble damages for certain kinds of trespasses.

But we do earnestly insist that the facts alleged (if believed) amply warrant, and that the Federal law clearly awards, the value of the manufactured product, in these circumstances, as the just and lawful measure of damages.

Therefore, plaintiff in error, by counsel, respectfully petitions for a modification of said concluding paragraph of the learned opinion (or for such rehearing) for the reason that the Court has inadvertently usurped or encroached upon the jury's function in the determination of a fact in issue (i. e., the proposition whether defendants in error intentionally or mistakenly committed the trespass in question).

178 Said paragraph of the Opinion (pp. 11-12) reads:

"In as much, however, as it appears that the trespass was not willful in a legal sense, but in a belief of right under a mistaken interpretation of the game laws of the state, * * * the recovery should be limited to the actual value at the time of the conversion,

as disclosed by the evidence, instead of that of the manufactured product, * * *".

We believe the foregoing was inadvertent; for there was, and is, sharp dispute over the facts from which the character of this trespass is to be determined.

Plaintiff in error asserts that defendants in error (through their agents, Figg and Blake) employed diggers for the express purpose of getting these shells, and that the evidence proves the defendants in error not only to have been willful trespassers in fact, but shows that their depredations were flagrantly tortious.

Furthermore, defendants in error had to admit that, in the beginning, they asked (Tr. 97-9) for a license (or a "lease" of the water) to dig said shells, but that same was refused! They have attempted, since this litigation began, to conceal and destroy (Tr. 78-82) evidence of their acts. They even clandestinely shipped and converted one car load of said shells after the demand that preceded the filing of this action!!! (Tr. 33, 52-3).

We fear to consume space now by further recounting the facts and beg to refer to a fuller statement of them, with accurate references to the Transcript, at pages 24-27 and 30-33 of our original Brief.

179 We have thought that the undisputed facts in this record show defendants in error to have been willful trespassers as a matter of law. Certainly, the most they may claim is to have these facts, attendant upon their trespass, found by a jury, and the (willful or innocent) nature of said trespass determined by such finding.

The legal presumption is that said trespass was willful; much competent evidence tends strongly to show that it was willful; there is little, if anything, to indicate the contrary; and this issue, arising out of the facts of the case, should be submitted to a jury, as has been done (and adjudged by this Court) in other cases presenting the same question.

Liberty Bell, etc. Co. v. Smuggler, etc. Co. (C. C. A. 8th Cir.), 203 Fed. 795 (cer. denied, 231 U. S. 747)

Smith Timber Co. v. Auld, (C. C. A. 8th Cir.), 218 Fed. 826 (by Judge Hook).

Our position on the question of the measure of damages is so completely vindicated by the recent case of Union Naval Stores Company vs. United States, 240 U. S. 284 (a direct authority squarely in point, duly cited heretofore) that we hope Your Honors will see same again; and, upon the authority of that case, we assert that the trespass here in question should be held to be willful as a matter of law—in view of admitted facts.

For, referring to the trespasser, the Supreme Court, in that case said:

"He acted with full notice of the facts, and his mistake of law can not excuse him" (p. 29.).

180 Yet the learned Opinion, in the case at bar, appears to characterize the trespass now under review as non-willful because the trespasser acted

"in a belief of right under a mistaken interpretation of the game laws." (Op., last par.)

Hence, if the trespass involved in this case be not held willful, as a matter of law, because of uncontroverted facts, a jury, on the new trial, should certainly be allowed to determine the nature of said trespass from all of the facts in evidence.

II.

As a matter of practice—involving Constitutional right—the said ruling, contained in the learned Opinion, cannot now stand consistently with the law as expounded in Slocum v. New York Life Ins. Co., 228 U. S. l. c. 376, et seq., to which we beg to refer; for the issue in question, like all other issues of fact, must go to the jury at another trial.

Wherefore, plaintiff in error, by counsel, moves and prays that said final paragraph of the learned Opinion (quoted above) be modified, or that a rehearing thereon be granted.

Respectfully submitted,

S. MAYNER WALLACE,
Attorney for Plaintiff in Error.

St. Louis, Mo., Jan. 1921.

181 *Certificate of Counsel.*

The undersigned, of counsel for plaintiff in error, Benjamin Gratz, hereby certifies that in his opinion the foregoing Petition is well founded in point of law; that the same is not interposed for delay, but is presented and filed in good faith in the belief that same ought to be granted.

S. MAYNER WALLACE,
Attorney and of Counsel for Plaintiff in Error.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 21, 1921.

182 United States Circuit Court of Appeals, Eighth Circuit.

No. 5285.

BENJAMIN GRATZ, Plaintiff in Error,

v.

JAMES S. MCKEE et al., Defendants in Error.

In Error to the District Court of the United States for the Eastern District of Missouri.

Response to Motion of Plaintiff in Error for Modification of Opinion, etc.

So far as we are able to learn there is no settled practice concerning the filing of suggestions in opposition to motions of the character filed by plaintiff in error here, and, ordinarily, we would not annoy the Court with a response, and we shall endeavor now to refer only to such matters as we think would aid the Court in its consideration of the motion.

There is absolutely no warrant in the record to support
183 the statement that defendants in error employed diggers for the express purpose of getting these shells. That is a mere assertion of plaintiff in error without any evidence to support it.

Plaintiff in error states that defendants in error asked for a license or a lease of the water to dig said shells. In view of the facts this statement of counsel is wholly incomprehensible. The record shows that in 1912 (Rec., p. 97), a year before the defendants in error bought any of these shells (Rec., p. 84), one W. A. Blake endeavored to secure control of the banks (not of the water, as counsel for plaintiff in error states) for the purpose as he stated (Rec., p. 98): "If we can get hold of these here banks there is only just a few places that other fellows could put up cook houses." There is not a line in the record to justify the statement that defendants in error endeavored to secure such license nor that they knew where the shells came from (Rec., p. 88).

The record is also conclusive upon the fact that Mr. Blake was never in the employ of the defendants until several years after these transactions, when he worked for them for a period of about six months from May 27, 1916, until the first of the following December.

As to the purchase of the last car the evidence shows it was purchased only upon the assurance given defendants that they came from a point which was not questioned (Rec., p. 87).

Nor is there any warrant for the statement that defendants in error intentionally destroyed evidence since this case was begun. The facts are these: A suit was brought in Iowa upon this same cause of action and plaintiff was defeated. The defendants had

that trial the letters referred to. Subsequently, and after the
84 conclusion of that trial, the filing clerk of the defendants destroyed a large amount of old files and presumably these
etters and checks were among them; at least they could not be
ound (Rec., pp. 73, 78, 81).

As this Court has held, these mussels are shell fish capable of
comotion, and, therefore, migratory fish. People in the vicinity
f the lands of the assignors of plaintiffs had been taking these
nussels from the river for six years or more (Rec., p. 93) before the
lefendants bought any of them. The agent of the plaintiff's as-
signors (who was on the ground) knew what was going on; in fact,
himself hauled some of these shells for others (Rec., pp. 51, 96, 98),
nd, as stated by one of plaintiff's witnesses (Rec., p. 50), "All this
igging, selling and shipping was done in broad daylight, and open
nd above board. Nobody had any thought about not having a
ight to do it, so far as I know. I thought it perfectly proper to do
t, and that there was no question about it". This is corroborated
y plaintiff's main witness (Rec., p. 42).

All of the foregoing unconverted facts, as well as the fact that
hese mussels were taken from a stream flowing through a large por-
ion of the State, clearly justify the conclusion, as matter of law,
hat the defendants, if guilty of trespass at all (and we contend they
ere not, for the reasons stated in our brief in support of petition for
ehearing), they cannot be said to have been willful trespassers.

The case of Union Naval Stores Co. v. United States, 240 U. S.
284, relied upon by plaintiff in error, is not at all in point. There
as the case of one who had homesteaded a piece of land to which he
had not yet acquired title. Rayford, who carried on the tur-
185 pentining operations, knew this, but, notwithstanding such knowledge, and in the face of the statutes prohibiting such
operations, he did secure the turpentine from the trees on the home-
stead land and distilled it, and then, through an arrangement with
the Naval Stores Company, it was sold for Rayford's account, and
this was done under the circumstances, as the Court states (page
291), "that the mortgage and shipping contract alike contemplated
that Rayford should manufacture the crude turpentine into spirits
and rosin, and ship these to defendant, and such was the actual
course of dealing thereunder".

Since the defendants were not willful trespassers, they were liable
only for the value of the shells as they were in the water, according
to the accepted doctrine in this country.

The generally accepted doctrine is stated in Sligo Furnace Co. v.
Tie Co., 153 Mo. App., l. c. 445, as follows:

"In our judgment, the true rule for fixing the measure of damages is that if the timber was taken by honest mistake, then the value of the timber, before being cut, is the measure of damages, but if the party taking the timber knew he had no right to it, and thus became a willful trespasser in the first instance, then in a suit against him the measure of damages is the value of the timber in its improved condition without reduction for labor bestowed, or expense incurred by the wrongdoer" (citing many cases).

And in Woodenware Co. v. United States, 106 U. S., l. c. 434, the Court says:

"The weight of authority in this country, as well as in Eng-
186 land, favors the doctrine that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property, when first taken, must govern; or, if the conversion sued for was after value had been added to it by the work of defendant, he should be credited with this addition."

We respectfully submit that the motion of plaintiff in error for modification should be overruled, and that the petition of defendants in error for a rehearing should be granted.

LON O. HOCKER,
FRANK H. SULLIVAN,
Attorneys for Defendants in Error.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 28, 1921.

187 (*Per Curiam Opinion on Petitions for Rehearing.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1920.

No. 5285.

BENJAMIN GRATZ, Plaintiff in Error,

vs.

JAMES S. MCKEE et al., Defendants in Error.

In Error to the District Court of the United States for the Eastern District of Missouri.

Before Hook and Carland, Circuit Judges, and Van Valkenburgh, District Judge.

Both plaintiff in error and defendants in error have filed petitions for rehearing, the plaintiff in error, as an alternative, requesting a modification of the opinion. With respect to that of defendants in error we are of opinion that it presents nothing that was not duly argued and considered at the hearing and in no respect answers the conclusion reached. We are satisfied with that conclusion, and the petition is accordingly denied.

Plaintiff in error urges a modification of the last paragraph of the opinion filed, or a rehearing on the question of the measure of damages referred to therein. It is suggested that the opinion invades the province of the jury, and that the decision is contrary to that
188 of the Supreme Court in Union Naval Stores Company v. United States, 240 U. S. 284. That case was before the court

and duly considered. The law involved and the situations presented in the two cases are essentially different. Our conclusion upon the facts recognized the rule announced in the case cited, but the evidence showed to our satisfaction that there was no willful trespass in the case at bar.

In their original brief filed in this case, under the heading "What is the Proper Measure of Damages", counsel for plaintiff in error said:

"The plaintiff's contention is not only that defendants were willful and intentional trespassers but that they have concealed or destroyed evidence tending to the proof thereof. The facts referred to are hardly disputed now; and, as there was a demurrer to the evidence, their effect may be fully assumed."

In their reply brief they again urged this issue upon the court in the following language:

"More important on this phase of review is the issue as to the measure of damages, which we believe should be solved by allowing the highest value the property acquired while in defendants' possession, since it is manifest from the testimony that defendants had no vestige of claim of right and no semblance of consent to excuse the trespass. * * *

"As this issue is so vitally material to the final result, we hope it will be disposed of on this review, should a new trial be awarded."

Obviously counsel were not seeking a ruling by this court upon the abstract proposition that where the trespass is willful the owner is entitled to the product manufactured by a third person who knowingly purchased the same from the trespasser, a doctrine already most conclusively established by the Supreme Court in Union Naval Stores Company v. United States, supra. What counsel evidently desired, and certainly invited, was a ruling upon this concrete case presented. We complied with this request. It is hardly consistent now to say that we had no power to do so. The rehearing
89 and modification prayed by plaintiff in error must accordingly be denied.

Filed February 10, 1921.

90 (*Order Denying Petitions for Rehearing, etc.*)

December Term, 1920.

Thursday, February 10, 1921.

This cause came on this day to be heard upon the petition for a rehearing or a modification of the opinion of this Court filed by counsel for plaintiff in error and also upon the petition for a rehearing filed by counsel for defendant in error.

On consideration whereof, it is now here ordered by this Court, that said petitions for rehearing or modification of opinion, be, and the same are each hereby, denied.

February 10, 1921.

(*Motion for Stay of Mandate.*)

Now come the defendants in error in the above entitled cause and respectfully state that it is their present purpose to have prepared and file with the Clerk of the Supreme Court of the United States, within the time prescribed by the Statutes, a petition for a writ of certiorari in the above entitled cause.

Wherefore, defendants in error pray that an order may be entered staying the issuance of the mandate in this cause until after a sufficient time has elapsed to enable the Supreme Court of the United States to pass upon such petition for writ of certiorari, upon the condition that they shall file their petition for certiorari within three months from the date of the overruling of their petition for rehearing.

LON O. HOCKER,
FRANK H. SULLIVAN,
JONES, HOCKER, SULLIVAN & ANGERT,
Attorneys for Defendants in Error.

191 (Endorsed:) Filed in U. S. Circuit Court of Appeals. Feb. 10, 1921.

(*Order Staying Mandate.*)

December Term, 1920.

Thursday, February 10, 1921.

Upon motion of defendants in error for an order staying the issuance of the mandate of this Court pending an application to the Supreme Court of the United States for a writ of certiorari, It is now here ordered, by this Court, that the issuance of the mandate in this cause be, and the same is hereby, stayed for a period of sixty days from and after this date and if said application for writ of certiorari is submitted to the Supreme Court within said period the issuance of the mandate of this Court will then be withheld until the same has been disposed of.

February 10, 1921.

192 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United

States for the Eastern District of Missouri, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinions, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals, wherein Benjamin Gratz was Plaintiff in Error, and James S. McKee, et al., were Defendants in Error, No. 5285, as full, true and complete as the originals of the same remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this sixteenth day of March, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

193 In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 5285.

BENJAMIN GRATZ, Plaintiff in Error,

vs.

JAMES S. MCKEE et al., Defendants in Error.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the certified transcript of record prepared by the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit and filed with the petition for the writ of certiorari in the Supreme Court of the United States, and now on file in the office of the Clerk of the Supreme Court of the United States, shall stand as the return of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit to the writ of certiorari issued in said cause, without the preparation of another transcript, and to this end it shall only be necessary for said Clerk to transmit to the Clerk of the United States Supreme Court a certified copy of this stipulation as his return to the writ of certiorari.

FRANK H. SULLIVAN,
LON O. HOCKER,
GEORGE F. HAID,
Attorneys for Defendants in Error.
S. MAYNER WALLACE,
Attorney for Plaintiff in Error.

[Endorsed:] No. 5285. In the United States Circuit Court of Appeals for the Eighth Circuit. Benjamin Gratz, Plaintiff in Error, vs. James S. McKee, et al., Defendants in Error. Stipulation as to Return to Writ of Certiorari. Filed May 11, 1921, E. E. Koch, Clerk.

194 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Benjamin Gratz is plaintiff in error, and James S. McKee et al. are defendants in error, No. 5285, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Missouri, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send
195 without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the ninth day of May, in the year of our Lord one thousand nine hundred and twenty-one.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

196 *Return to Writ.*

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Benjamin Gratz, Plaintiff in Error, v. James S. McKee, et al., No. 5285, is a full, true and complete transcript of all the pleadings, proceedings and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this nineteenth day of May, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk U. S. Circuit Court of Appeals
for the Eighth Circuit.

[Endorsed:] File No. 28,203. Supreme Court of the United States, October Term, 1920. No. 846. James S. McKee et al. vs. Benjamin Gratz. Writ of Certiorari. Filed May 11, 7921. E. E. Koch, Clerk.

197 [Endorsed:] File No. 28,203. Supreme Court U. S., October Term, 1920. Term No. 282. James S. McKee et al., Petitioners, vs. Benjamin Gratz. Writ of certiorari and return. Filed May 21, 1921.

Office Supreme Court, U. S.
FILED
APR 4 1921
JAMES D. MAHER,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 846 [redacted]61

JAMES S. McKEE, NELLIE CANON BLIVEN, Executrix of WILLIAM E. BLIVEN, Deceased, McKEE & BLIVEN BUTTON COMPANY,
Petitioners,

vs.

BENJAMIN GRATZ,
Respondent.

NOTICE, PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION.

FRANK H. SULLIVAN,
LON O. HOCKER,
GEO. F. HAID,
Counsel for Petitioners.

St. Louis Law Printing Co., 415 N. Eighth St. Bell, Main 1819.

INDEX.

	Page
Notice of petition for writ of certiorari	1
Petition for writ of certiorari	3
Statement of facts	3
Article I of the Constitution of Missouri	6
Specifications of ground of complaint	8
Prayer for writ	10
Verification of petition	11
Brief in support of petition	13
Statement	13
Section 1625, R. S. Mo. 1879	18
Section 3910, R. S. Mo. 1889	19
Section 2305, R. S. Mo. 1899	19
Laws of Missouri 1905, p. 159	20

List of Authorities.

Beach v. Morgan, 67 N. H. 529	30
Benson v. Morrow, 61 Mo. 349	35
Gratz v. McKee & Bliven Button Co., 258 Fed. 339	22, 27
Hardin v. Jordan, 140 U. S., l. c. 382	13
Marsh v. Colby, 39 Mich. 626	33
McCready v. Virginia, 94 U. S. 394	24
McKinney v. Northcutt, 114 Mo. App. 146	15, 35
Ruling Case Law, page 1039	29
State v. Blount, 85 Mo. 546	22
State v. Hager, 194 Mo. 712	23
State ex rel. Wear v. Springfield Gas & El. Co., 204 S. W. 945	24
Weller v. Missouri Lbr. & Mining Co., 176 Mo., l. c. 256	15
Willow River Club v. Wade, 42 L. R. A. 322	25

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. ———.

JAMES S. McKEE, NELLIE CANON BLIVEN, Executrix of WILLIAM E. BLIVEN, Deceased, McKEE & BLIVEN BUTTON COMPANY,
Petitioners,

vs.

BENJAMIN GRATZ,
Respondent.

NOTICE OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To Benjamin Gratz, Respondent, and S. Mayner Wallace, His Attorney of Record:

Please take notice that on Monday, April 11th, 1921, at the opening hour of the Supreme Court of the

United States, or as soon thereafter as counsel can be heard, we will present to said Supreme Court, at Washington, D. C., a petition for a writ of certiorari in the above-entitled matter, to be directed to the United States Circuit Court of Appeals for the Eighth Circuit, a copy of which petition and the brief in support thereof is furnished you herewith.

Dated this 30th day of March, A. D. 1921.

FRANK H. SULLIVAN,
LON O. HOCKER,
GEO. F. HAID,
Counsel for Petitioners.

Service of a copy of the above notice, together with a copy of the petition and the brief in support thereof, is hereby admitted this 31st day of March, 1921.

S. MAYNER WALLACE,
Counsel for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. ———.

JAMES S. McKEE, NELLIE CANON BLIVEN, Executrix of WILLIAM E. BLIVEN, Deceased, McKEE & BLIVEN BUTTON COMPANY,
Petitioners,

vs.

BENJAMIN GRATZ,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now come your petitioners, James S. McKee, Nellie Canon Bliven, executrix of William E. Bliven, deceased, McKee and Bliven Button Company, and make this their petition for a writ of certiorari to the

United States Circuit Court of Appeals for the Eighth Circuit, and in support thereof respectfully state:

This suit was begun on April 24, 1916, in the Circuit Court of the City of St. Louis, Missouri, by petition and affidavit for attachment, and was thereafter, on the ground of diversity of citizenship, duly removed to the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. The action was one in trespass for the conversion of certain mussel shells. The facts, succinctly stated, were these:

The mussels (shell fish, Rec., p. 113), from which the shells in controversy were recovered, were found by residents of the vicinity of Little River, and after cooking to kill the mussel, the shells were shipped out and sold to button manufacturers.

Little River is a stream in Southeastern Missouri, about 200 miles in length, which flows into the St. Francois River, and thence into the Mississippi River. The St. Louis Union Trust Company and the Himmelberger-Harrison Lumber Company owned lands bordering the stream, who assigned their claim for damages growing out of the alleged trespass to the respondent, who brought the suit.

The facts show that Little River is not navigable in the full sense of that term, but is capable of a public use for rafting, floating logs, and for navigation in

small boats (Rec., pp. 50, 51, 95), and for many years has been the subject of such use by the community (Rec., pp. 50, 51, 95, 100), and timber and logs were rafted and floated to market on the stream (Rec., pp. 50, 95), and duck hunters, trappers, fishermen and frog hunters passed up and down the stream and on adjoining lands at will for long numbers of years, pursuing their respective callings and taking water fowl, fur-bearing animals, fish and frogs for use or for the market, without let or hindrance from anyone (Rec., pp. 43, 50, 100). As early as 1907 (Rec., p. 93) the people in the vicinity began to gather these mussels, and in 1912 (Rec., p. 93) they shipped the shells to button manufacturers at various points. Only the shell of the live mussel is used—the shells of dead mussels having no value (Rec., p. 96).

During all the time these mussel shells were gathered, the assignors of plaintiff had a man on the ground as their agent to look after the property (Rec., pp. 49, 96), who knew the circumstances here stated from the beginning of the industry, indeed, on some occasions, for compensation, he furnished a wagon and team to haul the shells and load them into cars for shipment to button manufacturers (Rec., pp. 51, 96), and no objection was ever made to taking these shells from the river (Rec., pp. 50, 86, 100).

It was the practice of the shell gatherers after catching the mussel, to carry the latter to the banks

of the river, where the same were cooked, thus separating the mussel from its shell. In 1913 petitioners purchased from W. A. Blake some of the shells gathered under the circumstances stated. No objections were ever made by the landowners or their agents to the shell gatherers taking shells out of the stream or to cooking out the mussels on their land.

The Constitution of Missouri, Article I (Rev. Stats. Mo. 1909, p. 44), provides:

> "The river Mississippi and the navigable rivers *and waters* leading to the same, shall be common highways, and forever free to the citizens of this state and of the United States."

There was also a statute in force in Missouri (Laws 1905, page 159, Revised Stats. Mo. 1909, Section 6508) which provides, among other things, as follows:

> "Section 1. The *ownership of and title to* all birds, *fish* and game in the State of Missouri, not held by private ownership, legally acquired, *is hereby declared to be in the state.* * * *"

There was also a statute in force in Missouri (Section 6551, Revised Stats. Mo. 1909) which provides as follows:

> "Sec. 6551. It is hereby declared unlawful for any person to engage in what is commonly known as 'pearl fishing' in any of the waters of this

state at any time during the months of March, April, May and June. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense."

The pearl fishing here dealt with consisted in gathering these same mussels, in the manner above detailed, for the purpose of extracting pearls if any found therein.

Upon the trial in the District Court a peremptory instruction in favor of petitioners was granted. Upon writ of error (decision by Judges Sanborn, Carland and Munger) the judgment of the trial court was affirmed. Subsequently a petition for rehearing was granted, and on such rehearing (decision by Judges Hook, Carland and Van Valkenburgh) the judgment of the trial court was reversed November 13, 1920. In due time petitioners filed a petition for rehearing and this was denied February 10, 1921.

Petitioners further state that the decision in this case is one affecting a large industry, and one, therefore, which is of great public importance; that a large number of people have made their livelihoods by gathering mussel shells from the various streams in the country and selling the same to button manufacturers; that until this case was filed no one has ever questioned the right of the people to gather such

shells, nor had anyone ever questioned the right of such persons to dispose of such shells as their own property.

Petitioners further state that the opinion and judgment of the United States Court of Appeals for the Eighth Circuit, which reversed the judgment of the trial court is erroneous in the following particulars to wit:

I.

The decision of the Court is contrary to the laws of Missouri, in this, that by Section 1 of Article I of the Constitution of Missouri, it is provided that "the river Mississippi and the navigable rivers and waters leading to the same shall be common highways and forever free to the citizens of this state and of the United States;" and it is the law of Missouri that "waters capable of floating or other navigation periodically during the year" are navigable streams within the provisions of the Constitution of the State of Missouri.

II.

Because the decision is contrary to the construction placed upon its statutes by the courts of the State of Missouri.

III.

The decision, while conceding that the fresh-water mussel is a shell fish capable of locomotion sufficient to bring it within the category of migratory fish, erroneously holds that the taking of such mussels from a public stream passing through the land of the respondent constituted such a trespass as permitted a recovery as for conversion against a stranger who purchased the shells from the alleged trespasser.

IV.

The decision erroneously holds that petitioners are liable for conversion of the shells, instead of holding that the only action which respondent was entitled to maintain was one in *quare clausum fregit* against those who actually trespassed upon his land.

V.

The decision of the Circuit Court of Appeals is erroneous because it entirely disregards the implied license to gather the mussels which grew out of the many years such practice was permitted without objection.

VI.

The decision of the Court of Appeals is contrary to the well and long-established custom of the people of the community with respect to the right to resort to, and make use of, those streams too small in volume to be regarded as navigable in law, but of too much importance to be regarded as purely private property—streams capable of a limited public use and enjoyment.

Petitioners further state that they have filed herewith a certified transcript of the record in the United States Circuit Court of Appeals.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Honorable Court to the United States Circuit Court of Appeals for the Eighth Circuit, requiring and directing the said United States Circuit Court of Appeals, by a date certain to be designated therein, to certify and send to this Honorable Court a full, true and complete transcript of the record and proceedings in the case of Benjamin Gratz, plaintiff in error, v. James S. McKee, Nellie Canon Bliven, executrix of William E. Bliven, deceased, McKee & Bliven Button Company, defendants in error, said cause being No. 5285 upon the docket of said United States Circuit Court of Appeals for the Eighth Cir-

cuit, to the end that the said cause may be reviewed and determined by this Honorable Court, and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with law, and that the said judgment of the said United States Circuit Court of Appeals for the Eighth Circuit in said case may be reversed by this Honorable Court.

JAMES S. McKEE,
NELLIE CANON BLIVEN,
Executrix of William E.
Bliven, Deceased.
McKEE & BLIVEN BUTTON COMPANY,
Petitioners,

By FRANK H. SULLIVAN,
LON O. HOCKER,
GEO. F. HAID,
Attorneys for Petitioners.

State of Missouri, }
City of St. Louis. } ss.

Geo. F. Haid, being duly sworn, upon his oath says that he is one of the counsel for James S. McKee, Nellie Canon Bliven, executrix of William E. Bliven, deceased, and McKee & Bliven Button Company, the

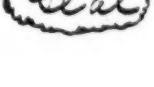
petitioners in the foregoing petition for a writ of certiorari; that he prepared the foregoing petition, and the allegations contained therein are true as he verily believes.

GEO. F. HAID.

Subscribed and sworn to before me by the said Geo. F. Haid this 30th day of March, A. D. 1921.

My commission expires March 2, 1923.

EDWARD W. LAKE,
Notary Public within and for the City of St. Louis, Missouri.



BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF CASE.

The facts upon which the petition for writ of certiorari in this case is founded, are set out in the petition. In short, the question involved is whether a purchaser of mussel shells from one who has gathered such shells from a public stream is liable to the owner of the banks of the stream in an action for trespass for conversion.

The importance of the particular litigation grows out of the fact of the contrariety of decision respecting the rights of owners of land bordering upon the streams of the country. As is said in Hardin v. Jordan, 140 U. S., *l. c.* 382, it is the law of Iowa that with regard to land on the banks of the Mississippi the title of riparian proprietors extends only to ordinary high-water mark, and that the shore between high and low water mark, as well as the bed of the river, belongs to the state; while on the east side of the Mississippi, in the States of Illinois and Mississippi, it is held that the title of the riparian proprietor extends to the middle of the current, and that the beds of the streams

belong to the owner of the adjoining land, so that if the doctrine announced by the Circuit Court of Appeals in this case is to prevail, the riparian owners whose title extends to the middle of the current, and who are thereby owners of the bed of the stream, are also so far the owners of the migratory fish in the stream as will entitle them to recover in conversion against anyone who purchases such fish from a person other than the owner in front of whose premises the same were caught, because the Circuit Court of Appeals holds that

> "the owner of the soil would have a qualified, but substantial, property interest in the fish upon his own land, with the exclusive right to reduce it to possession superior to that of others, and subject only to regulation by the state."

I.

The decision of the Circuit Court of Appeals is contrary to the laws of Missouri.

By Section 1, of Article I of the Constitution of Missouri, it is provided that "the river Mississippi and the navigable rivers *and waters* leading to the same shall be common highways and forever free to the citizens of this state and of the United States."

In construing this constitutional provision the courts of Missouri have held that every stream lead-

ing to the Mississippi River *is a public highway* which is capable of transporting commerce in any manner in which such commerce is ordinarily conducted.

In Weller v. Missouri Lumber & Mining Co., 176 Mo. App., *l. c.* 256, the Court says:

> "The Constitution of Missouri, Article I, Section 1, reserves to the people the free use of all navigable streams leading to the Mississippi River as common highways. The law of this state, following the general trend of authority in this country, is that *a stream capable of transporting commerce in any manner in which such commerce is ordinarily conducted, is a navigable or floating stream and is a public highway.* In any given case, the question as to whether the stream has such capacity is one of fact for the jury to determine. The law on this subject was well declared by Nortoni, J., in the case of McKinney v. Northcutt, 114 Mo. App. 146, 89 S. W. 351."

McKinney v. Northcutt *et al.*, 114 Mo. App. 146, was an injunction brought against the owners of land on Indian Creek, who obstructed the passage of ties which plaintiff was floating on said stream. The proof showed that the creek in its natural state was from thirty-two to forty-eight feet wide and its depth in the most shallow places was from twelve to fourteen inches, and in other places it was fifteen feet in

depth; that in the months of April, May and June, as well as in some of the autumn months, it was usually well supplied with water. On appeal it was contended that the creek was not a navigable stream and not subject to public use. Upon this question the Court says:

> "In this country, the capability of use by the public for the purposes of the transportation of commerce rather than the extent and manner of that use, affords the true criterion of the navigability of waters. If they are capable in their natural state of being used for the purpose of commerce, no matter in what mode the commerce may be conducted, they are navigable in fact, and become, in law, public highways. It is, therefore, laid down in 21 American and English Encyclopedia of Law (2 Ed.), at page 428, as follows:
>
> " 'Streams of sufficient capacity to float logs or timber to market have been frequently declared to be navigable in fact. And this has been said to be true though at some particular point in their course, the streams are not of sufficient capacity to float logs without manual aid from the shore. Waters, to be navigable, must be so far navigable or floatable in their natural state and in their ordinary capacity as to be of public use in the transportation of property.'
>
> "Waters, which can be made floatable only by artificial means, are not regarded as public highways. Nor is it necessary to constitute a stream

navigable for floating and rafting within the law that they should be capable of continuous use during the whole year for that purpose. It is sufficient to render a stream navigable within the sense under contemplation, if, as a result of natural causes, it be capable of floatage or other navigation periodically during the year, and so continue long enough at each period to render it susceptible to beneficial use by the public (21 Am. & Eng. Ency. Law, 2 Ed., 428-429)."

The evidence in this case shows (Rec., p. 51): "There was a sawmill down there at that time. The stream was used for small craft, small boats and dug-outs, to carry provisions and things of that kind. The roads were not particularly good in that country at different seasons of the year. When the river was high the roads would be pretty bad from the water. The principal transportation there would not be by the river, for people going back and forth; but the individuals used it, whenever they saw fit, to carry things. If they wanted to go up or down the river and carry a little amount, probably they would go in boats. If they lived on the river they would carry anything to their homes, back and forth, that way," and that Little River (Rec., p. 95) "meandered diagonally from the northeast to the southwest across this territory by maybe two townships. Quite a good many logs were floated down it. At Wardell there

was a sawmill; two that I know of. The river was the only way of travel for a good part of the time, in boats. The roads in that country was so poor that you couldn't go with wagons."

But in spite of these decisions and this evidence, the Circuit Court of Appeals held that "even if this so-called river be regarded as navigable, in this very restricted sense the use which any person may lawfully make of such water is limited to such incidental right of floatage or qualified navigation."

II.

The decision is contrary to the construction placed upon its statutes by the courts of the State of Missouri.

For many years prior to 1905 there were upon the statute books of Missouri various acts regulating the catching of fish. Thus, in 1879, the Legislature passed an Act (R. S. Mo. 1879, Sec. 1625) providing that:

> "No person shall be allowed to place, erect, or cause to be placed, erected or maintained in any of the waters of the state * * * any seine, net, gill net, trammel net * * * or any other device or obstruction, or by any such means to take or catch any fish in any of the waters of the state; *provided*, that the prohibitions of this section shall not apply to waters wholly on the premises

belonging to such person or persons using such device or devices," etc.

The above section 1625 as amended, appears in the revision of 1889 as section 3910, and so far as the same is of interest here is substantially to the same effect, but it contains this proviso:

"Provided, the provisions of this section shall not apply to persons who own land adjoining such waters from taking fish for their own family use, and provided, further, that they shall not prevent the free passage of fish from passing up and down such waters."

In 1895 the Legislature passed another act, which contains provisions against the killing of game and for the protection of fish, which, as amended in 1897, appears in the Revised Statutes of 1899 as section 2305. This section, as far as it relates to fish, is as follows:

"* * * It shall also be unlawful for any person to place, erect or maintain, or cause to be placed, erected or maintained in any of the waters of this state, or in front of the mouth of any stream, slough, bayou any seine, net, gill net, trammel net, wing net, bag weir, brush drag, fish trap or fish dam or other device for catching fish, nor by any such means shall take or catch any fish in the waters of this state: *Provided,*

this section shall not apply to ponds, pools or reservoirs wholly on the premises belonging to such persons using such device or devices; * * * "* * * *Provided*, that nothing in this section shall be construed to prevent any person from catching fish with a seine with meshes not less than two (2) inches in size, *in any stream of water* flowing through or bordering on lands belonging to such person: *Provided*, that such person shall not use said seine for more than two (2) hours in any one day (Laws 1895, p. 182; Amended, Laws 1897, pp. 120, 122-a)."

It will be noted that in each instance the statutes exempt from the provisions thereof, waters wholly on the premises belonging to "such person or persons using such device or devices."

In 1905 these laws were modified by Act of March 10, 1905 (Laws of Missouri, 1905, p. 159) (afterwards Sec. 6508 of the R. S. 1909), sections 1 and 30 of which are as follows:

Section 1. "The *ownership of and title to* all birds, *fish* and game in the State of Missouri, not held by private ownership, legally acquired, *is hereby declared to be in the state*, and no fish, birds or game shall be caught, taken or killed in any manner or at any time, or had in possession except the person so catching, taking or killing

or having in possession shall consent that the title to said fish, birds and game shall be and remain in the State of Missouri for the purpose of regulating and controlling the use and disposition of the same after such catching, taking or killing. The catching, taking, killing or having in possession of birds, fish or game at any time, or in any manner, by any person, shall be deemed a consent of said person that the title of the state shall be and remain in the state for the purpose of regulating the use and disposition of the same, and said possession shall be consent to such title in the state."

Section 30. "It shall be unlawful for any person or persons to take, catch or kill any fish in any of the waters of this state by means of any seine, trammel net, gill net, fish trap or any other kind of net, trap, device or means other than by ordinary hook and line, gig, spear and trot line. This law shall not apply to ponds or reservoirs wholly on the premises belonging to any person using such device; and seining shall be lawful and allowed in the Mississippi and Missouri Rivers, but not within three hundred yards from the mouth of any stream emptying into said rivers, between the first day of July in each year and the first day of April in the following year with seines, the meshes of which shall not be less than two inches square. Any person may use a small seine, not more than twenty feet in length and four feet in width, known as a minnow seine, for catching minnows to be used for bait only. Any person offending against any of the provisions of

> this section shall be deemed guilty of a misdemeanor, and be subject to a fine of not less than $50 nor more than $200 and costs of prosecution."

And, again, in this act it is provided in effect that the same shall not apply to waters wholly on the premises of the person using a prohibited device, and necessarily, therefore, the act must be applicable to all waters not wholly upon the land of the person, and this is the construction placed upon these acts by the Supreme Court of Missouri in the case of State v. Blount, 85 Mo. 546, in which the Court says:

> "If a stream, it must have its source and its mouth, and its whole course, on the sole owner's or the joint owner's land," etc.

In the opinion first filed by the United States Circuit Court of Appeals (Judges Sanborn, Carland and Munger), 258 Fed., l. c. 339, it was held that under the statute of 1905, above quoted, title to the killed mussels vested in the state.

In the opinion last filed by the United States Circuit Court of Appeals (Judges Hook, Carland and Van Valkenburgh), not yet reported, declares that the section of the statute above quoted "contains striking internal evidence that the title declared was assumed for the sole purpose of regulation and control," and

that it is a statute of regulation pure and simple, and which determination is contrary to the construction placed upon the statute by the courts of Missouri.

In the case of State v. Heger, 194 Mo., l. c. 712, which was a prosecution under the section of the statute under discussion, the Court says:

> "'In the first place, then, we have already shown, and, indeed, it cannot be denied, that by the law of nature every man, from the prince to the peasant, has an equal right of pursuing and taking to his own use all such creatures as are *ferae naturae,* and, therefore, the property of nobody, but liable to be seized by the first occupant, and so held by the imperial law even so late as Justinian's time. * * * But it follows from the very end and constitution of society that this natural right, as well as many others belonging to a man as an individual may be restrained by positive laws enacted for reasons of state or for the supposed benefit of the community' (2 Bl. Com. 410). This prerogative of the king as an attribute of government recognized and enforced by the common law of England by appropriate and oftentimes severe penalties and forfeitures, was vested in the colonial governments of this country, and when these governments threw off the yoke of the mother country, that right of sovereignty passed to and vested in the respective states. This sovereign attribute and power as existent in the states of this Union has often been exercised by them by passage of

laws in the most of these states for the protection and preservation of game; and it seems never to have been called in question. Numerous adjudications attest this fact. *In such cases the common ownership of game, which otherwise would remain in the body of the people, is lodged in the state to be exercised like all other governmental powers in the state in its sovereign capacity,* to be exercised in trust for the benefit of the people."

And in the case of State ex rel. Wear v. Springfield Gas & Electric Co., 204 S. W., l. c. 945 (Mo. App.), the Court says:

> "Section 6508, R. S. 1909, vests *ownership* of and *title* to, fish in the state, and this *without regard to the character of the stream or creek* in which the fish may be. * * * The fish in Jordan and Wilson Creeks are the *property* of the state."

And again, at page 946, the Court again declares that "the state is by statute the owner of the fish in Jordan and Wilson Creeks."

In McCready v. Virginia, 94 U. S., l. c. 394, Mr. Chief Justice Waite, writing the opinion of the Supreme Court of the United States, after having referred to the title which the state owns to tidewaters, said this respecting the fishes which swim therein:

> "In like manner, *the states own the tidewaters themselves, and the fish in them, so far as they are capable of ownership while running.* For this purpose the state represents its people, and the ownership is that of the people in their united sovereignty."

This statute of Missouri was probably borrowed from Wisconsin, because we find that in 1897 a statute was adopted in Wisconsin (Laws Wisconsin, 1897, p. 326; Stats. of Wisconsin, 1913, sec. 4560), which is in almost the exact words of the statute of Missouri.

In the case of Willow River Club v. Wade, 42 L. R. A. *l. c.* 322, the Supreme Court of Wisconsin, as to this statute, says:

> "In this state the legislature has expressly declared that 'all fish in the public waters of the State of Wisconsin are hereby declared to be the property of the state' and may be taken for the use of the individual *and become his property* at any time and in any manner not prohibited by the laws of this state."

And the Court held that

> "Since the defendant kept within the banks of the river—within the limits of the public highway—his fishing was nothing more than the exercise of a right common to the public."

If the statute of Missouri in question was merely one of regulation, as is held by the last decision of the Court of Appeals, what possible object could the Legislature have had in passing it? The matter of regulation had been controlled by statutes for a quarter of a century or more before the enactment of the law of 1905, and prosecutions successfully maintained under them as is evidenced by the decisions of the courts of Missouri, and, therefore, since regulation only could not have been the purpose, and nothing being shown to otherwise explain its enactment, the construction placed upon the section by the courts of Missouri, that the act means just what it says, should prevail.

III.

The decision of the United States Circuit Court of Appeals erroneously holds that a purchaser of mussel shells taken from a stream flowing through the land of another is liable for conversion.

The instant case in many of its aspects is similar to the case of Willow River Club v. Wade, 42 L. R. A. 305, except that the last-mentioned case was one against the alleged trespasser, while the present case is one for conversion brought against the purchaser of the shells from the alleged trespasser.

At page 316 of 42 L. R. A. the Supreme Court of Wisconsin says:

> "In the case at bar it is conceded that the plaintiff owned the land on both sides of the stream, and hence has title to the bed of the stream. But the mere fact that the title to the bed of the stream is in the plaintiff is not necessarily conclusive that the plaintiff has title to the fish in the river."

Then after discussing the question of the navigability of Willow River and holding that "those rivers must be regarded as public navigable rivers in law which are navigable in fact," concludes that the river is navigable to a limited extent, and, therefore, navigable in law, and that

> "Being such, it necessarily follows, from the principles of law stated, that, notwithstanding the plaintiff has title to the bed of the river, nevertheless it holds that same in trust for the use of the public."

The Circuit Court of Appeals said in its first opinion (258 Fed., *l. c.* 337) that

> "These mussels cannot be separated from the waters of Little River, so far as their ownership is concerned. It is true they were found in the bed of the stream, but they could not live with-

> out the stream, and plaintiff's assignors could have no exclusive ownership in them independent of the ownership of the water in the stream."

As the Circuit Court of Appeals in its first opinion well says (258 Fed., *l. c.* 337):

> "The grant to plaintiff's assignors did not mention Little River or the waters thereof. * * * We find no reason for holding that plaintiff's assignors had by grant or otherwise an exclusive right of fishery in the waters of Little River at any point."

And on the same page the Court says:

> "To hold that plaintiff's assignors owned the mussels in controversy would be to decide that said assignors had an exclusive right of fishing in the waters of Little River, where these mussels were found."

Since then the plaintiff's assignors had not reduced the mussels to possession and acquired no title thereto until reduced to possession, how is it possible to hold petitioners guilty of conversion because of the fact that they bought the shells from those who actually possessed them?

IV.

The United States Circuit Court of Appeals in its last decision erroneously held petitioners liable in trespass for conversion instead of holding that respondent's action was *quare clausum fregit* against those who trespassed upon the land.

The record shows that the mussels in question were caught in the river and carried to the banks, where cooking outfits were maintained, and there the mussels were cooked and thus separated from their shells, the cooked mussels were fed to hogs and the shells were sold to various button manufacturers.

In its decision, the trial court held (Rec., p. 124) that respondent's right of action was against those who trespassed upon the lands for breaking the close, and stated the mussel hunters in this case did just as one would do "who traps a muskrat and takes it on shore and there pelts it."

When one enters upon the premises of another to catch fish, does the owner of the premises have title to the fish which will sustain an action in conversion, or has he another remedy?

In 11 R. C. L., at p. 1039, there is this statement on that subject:

> "*Trespass as Remedy.*—If one enters the private property of another and takes fish from waters wherein the owner has an exclusive right

to catch them, *he is guilty of a trespass.* Even though the fishery is owned by another than the owner of the soil, he may find a remedy in trespass, for his interest is an incorporeal hereditament which will support such an action. *The uncaught fish in the waters belong to the people of the state,* not to the owner of the soil beneath the waters, but this circumstance does not preclude the unlawful entry from being stamped as a trespass. The *entry* constitutes a trespass *quare clausem fregit,* not *a trespass de bonis asportatis. In the action he can recover no damages for the value of the fish, but only the damages for the trespass and the injury to his fishery.* If the proprietor has given a person a license to take fish from his fishing place, an action of trespass must fail; and it is sometimes thought that a custom of the public to take fish from the water will supply an express license, in the absence of notification to the contrary."

Of like effect is the decision of the Supreme Court of New Hampshire in Beach v. Morgan, 67 N. H. 529. In that case the plaintiff brought an action of trespass to recover damages from the defendant for having entered upon his premises and taken fish from a small, flowing stream which ran through the premises. There were questions dealt with in the opinion with respect to the right of recovery, which are not here of interest. Respecting, however, the measure

of reccover for a trespass of that nature, the New Hampshire Court said this:

> "The fish taken by the defendant being *ferae naturae,* the plaintiff can recover for the trespass only."

In other words, as the learned District Judge ruled in the opinion delivered in the course of directing a verdict for the defendants in the case at bar, when one enters upon the land of another and takes therefrom wild game, or wild fish, he has committed a trespass for which the owner may maintain trespass *quare clausum fregit,* and his damages will be enhanced by the value of the game removed, on the theory that by so removing it the trespasser has destroyed the right of the owner to reduce it to possession for his own purposes and thereby acquire title to it. But the game or fish so removed is not his own, and any action which he may bring against a stranger which has for its basis the assertion of title in himself must fail. In this case, according to that rule, the plaintiff's assignors might have sued those who removed these mussels from the river and recovered their value as damages for the trespass if it be assumed that they were without right to take them, but the removal gave the landowner no title to the shells,

and, without title to the shells, he can maintain no action against these petitioners who committed no trespass upon his premises.

V.

The decision of the Circuit Court of Appeals is erroneous because it entirely disregards the implied license to gather the mussels which grew out of the many years such practice was permitted without objection. For a long number of years, as the testimony in this case shows without contradiction, the public have been resorting to this stream for any purpose which pleased them. They have used it with their small boats as a way, they have fished up and down its course as a means of livelihood; they have resorted to it and shot wild fowl for pleasure and profit; beginning in 1907, and later, when the Little River mussel shell first came into the market, the citizens of that community who felt so disposed have gone upon the stream, taken the mussels, extracted them from the shell and shipped the shell to market, without let or hindrance from any riparian proprietor, not excluding the plaintiff's assignors. During all the time, at least that this mussel industry was being carried on, the plaintiff's assignors had an agent and representative upon the premises who knew all that

was transpiring. No complaint of any character was ever made with respect to removing these mussels until this action was begun.

Even assuming that the public had no right to resort to the stream for such purpose or for any purpose without the consent of the proprietor, nevertheless such course of conduct on the part of the plaintiff's assignors conferred on those who were so doing an implied license which prevented the maintenance of this action, or any other action of like kind, until the license were withdrawn.

A decision of the Supreme Court of Michigan is quite of interest in this connection. It is of further interest to note that this opinion was concurred in by no less than Judge Cooley and Judge Campbell, two shining landmarks of American jurisprudence.

The case is that of Marsh v. Colby, 39 Mich. 626. This was an action for trespass brought by the landowner against the defendant, who had gone fishing in a small inland lake included within the boundaries of the plaintiff's farm. This was entirely private property and there was no question about the title of the plaintiff to the lake. For a long period of time, however, the public had gone to this lake and taken fish as they chose, without any complaint on the part of the proprietor. It was held that these facts created an implied license which the proprietor could not

withdraw without notice or warning to the community to stay off of the premises. The opinion of the Court on that subject reads thus:

> "The small lake or pond on which the alleged trespass was committed was almost entirely inclosed within the lines of plaintiff's farm. Whatever question might arise respecting the right to exclusive fisheries in larger bodies of water, the right of the landowner to the exclusive control of small bodies thus situated would seem clear.
>
> "It has always been customary, however, to permit the public to take fish in all the small lakes and ponds of the state, and in the absence of any notification to the contrary, we think anyone may understand that he is licensed to do so. No such notification appears in this case, and we, therefore, hold that the defendant was not a trespasser in passing upon plaintiff's land with the intent to take fish, having no knowledge that objection existed to his doing so."

So that if we concede the entire right of the plaintiff's assignors, under ordinary circumstances, it yet remains that without some notice to the community that privileges previously enjoyed were withdrawn, they cannot contend that that was a trespass which had previously received their apparent sanction.

VI.

Missouri is not a tidewater state. The only streams within her boundaries of dignity sufficient to be capable of navigation in the completest sense of the term are probably the Mississippi, the Missouri and the lower reaches of the Osage and Gasconade Rivers (McKinney v. Northcutt, 114 Mo. App., *l. c.* 160; Benson v. Morrow, 61 Mo., *l. c.* 349). There are, of course, many small streams, not capable of any public user, which are the exclusive property of the riparian owner. Intermediate between those and these are many streams of variable and varying size and importance, which, while not public navigable streams, are yet capable of some public use. As to such the course of decision in the state, while recognizing the ownership of the riparian proprietor, has also declared the public right of user. These decisions have been cited heretofore. Throughout the entire history of the people of the state, the public right of fishery has gone hand in hand with the public right of travel and transportation. This is to say that from the earliest periods in the history of the state, according to universal custom and understanding, those streams navigable *sub modo* only, such as the Gasconade, the Big Piney, the Meramec, the Current, the Jack's Fork, the Eleven Point, the St. Francis, the Black and the Little River (the *locus in quo*) have been regarded as sub-

ject to a public right of fishery, as well as the public right of travel and transportation. It is our insistance that the two are twin sisters in law as well as in fact. The Court of Appeals appear to have ruled otherwise. Certainly, according to the customs and genius of the people the twain are one. *Consuetudo legem facit.* The opinion of the Court of Appeals, in our opinion, does not give due weight to this custom. The Court of Appeals have determined this controversy as though it concerned only the rights of the litigants. In so doing, we submit, with all respect, too narrow a view has been taken. The rights of an entire community have been determined and foreclosed, and that, too, contrary to the understanding, usages and customs of generations of men.

For the reasons stated, we respectfully submit that this is a case in which a writ of certiorari should be granted.

Frank H. Sullivan,

Lon O. Hocker,

Geo. F. Haid,

Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1921

No. [redacted]61

James S. McKee, Nellie Canon Bliven, *executrix* of William E. Bliven, and McKee and Bliven Button Company
Petitioners and Respondents
vs.
Benjamin Grats
Respondent and Petitioner

Action for Appropriating Mussel Shells

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

Brief and Argument for the Respondent-Petitioner

S. Mayner Wallace
Counsel for Respondent-Petitioner

St. Louis Law Printing Co., 415 N. Eighth St. Main 1819, Central 918

Subject Index

Page

Argument

Damages

measure of, manufactured product 30

measure of, statutory treble damages..... 35

License, Claim of..... 28

Mussels

property in (domestic animals)..... 16

property in (wild animals)..... 18

Property Appropriated (shells)..... 15

Statutes of Missouri

concerning treble damages for trespass..... 35

concerning State's "title" to game..... 22

Waters

non-navigability of 25

property rights in.....26-27, 28

Questions involved 11-12

Specification of Errors..... 13

Statement

Facts in Evidence

land titles, proof of..... 5

mussels and "musseling"..... 8

trespass and conversion..... 7

waters, concerning non-navigability of..... 10

Record Proper

pleadings 2-4

rulings below 4-5

List of Cases

Page

Adams v. Clark, 189 Ky. 279 29
American Law Reports, Vol. 7 p. 901 34
Vol. 11 p. 241 27
Arkansas v. Mallory, 73 Ark. 236 ..... 18, 24
Armory v. Delamirie (Smith's L. Cas.), 1 Str. 504 25
Barnett, etc. Co. v. Oil Co., 254 Fed. *l. c.* 488 41
Beach v. Morgan, 67 N. H. 529 22
Behring Sea Seal Arbitrators' Decision, 32 Am. L. Reg. & Rev. 901 20-21
Blades v. Higgs, 11 H. L. Cas. 621 ..... 18, 20
Brewer-Elliott, etc. Co. v. United States, 270 Fed. *l. c.* 102 and 103 26
Brown v. Eckes, 160 N. Y. S. 489 19
Congress, Act of Mar. 2, 1919 (c. 95, sec. 4, 40 Stats.) 26
Davis v. Green, 2 Hawaii 367 18
Dictionary, Century 36
Oxford 38
Duchess of Sutherland v. Watson, 6 MacPher. 199 ..... 16, 38-39
Fleet v. Hegeman, 14 Wend. (N. Y.) 42 16
Geer v. Connecticut, 161 U. S. 519 21
Gratz v. McKee, *et al.*, 258 Fed. 335 4
Gratz v. McKee, *et al.*, 270 Fed. 713 4
Gray v. Parker, *et al.*, 38 Mo. 160 34
Hardin v. Jordan, 140 U. S. 371 ..... 22, 28
Hartman v. Tresise, 36 Colo. 146 ..... 24, 28
Hobart-Lee Tie Co. v. Grabner (Mo. Ap.), 219 S. W. 975 27
Hooker v. Cummings, 20 Johns (N. Y.) 90 28
Johnson v. Burghorn, 212 Mich. 19 27
Jones v. De Merchant, 26 Man. 455 42
Laws of England, The (Halsbury), vol. 15, pps. 211-212 22
Lincoln v. Davis (Mich.) 27

List of Cases—Continued

Lonsdale v. Rigg, 11 Exch. 654..... 18
Marsh v. McNider, 88 Iowa 390..... 41
Mason v. United States, 273 Fed. 135..... 34
Minor's Institutes, vol. III, p. 7..... 17
Missouri Statutes, sec. 5448, R. S. Mo. 1909.....35–36
sec. 6508, R. S. Mo. 1909..... 22
sec. 7058, R. S. Mo. 1919..... 42
Oregon Iron Co. v. Hughes, 47 Oregon 313..... 41
Parker v. Lord Advocate, 4 Sess. Cas. 5th Ser., 707 39
6 Sess. Cas. 5th Ser., 37. 41
Parsons v. Manser, 119 Iowa 88..... 17
Percy Summer Club v. Astle, 163 Fed. 1..... 22
Peru, etc. Co. v. Harker, 144 Fed. 673..... 25
Reg. v. Garnham, 2 F. & F. (Eng.) 347..... 17
Rogers v. Jones, 1 Wend. (N. Y.) 237..... 24
Rosencranz v. Swofford Bros. Dry Goods Co., 175 Mo. 518 25
Ruling Case Law, Vol. 9, p. 745..... 29
Vol. 11, p. 1039..... 22
Schulte v. Warren, 218 Ill. 108.....19, 24, 27
Sentell v. N. O., etc. R. Co., 166 U. S. 698..... 17
Silsbury v. McCoon, 3 N. Y. 379..... 43
Sligo Furnace Co. v. Tie Co., 153 Mo. App. 442.. 34
Slovesky v. O'Reilly (Mo.), 233 S. W. 478..... 26
State v. Blount, 85 Mo. *l. c.* 547.....24, 28
State v. Taylor, 27 N. J. L. 117..... 16
State v. VanVlack, 101 Wash. 503.....9, 16, 37
State v. Weber, 205 Mo. *l. c.* 46-47..... 24
State v. West Tenn. Land Co., 127 Tenn. 575..... 28
Statham's Abridgment (Klingelsmith's), vol. 11, p. 1253 37
The Distilled Spirits, 11 Wall. 356..... 31
Thompson v. Tennyson, 148 Ga. 701..... 28
Union Naval Stores Co. v. United States, 240 U. S. 284..... 34
United States v. Loughrey, 172 U. S. 219..... 25
Willow River Club v. Wade (Wis.)..... 27

SUPREME COURT OF THE UNITED STATES

October Term, 1921

James S. McKee, Nellie Canon Bliven, *Executrix, etc.*, and McKee and Bliven Button Company Petitioners and Respondents -vs- Benjamin Gratz Respondent and Petitioner	No. 282

BRIEF AND ARGUMENT FOR RESPONDENT-PETITIONER

STATEMENT

This cause is here in virtue of a writ of certiorari allowed to review a judgment in the United States Circuit Court of Appeals, Eighth Circuit.

The writ was duly petitioned for, but upon different grounds, probably not material to be restated here, by counsel for the respective parties. The respondent-petitioner now seeks a modification of the judgment under review with respect to the declared measure of damages allowed him below.

A brief statement of the

Record

situation will first be made, and then supplemented with enough of the facts in evidence to show the questions now presented. The STATEMENT, for the other side, is "controverted."

Benjamin Gratz, as plaintiff, filed his *petition* (Tr. 6) by attachment, in the circuit court, City of St. Louis, Mo., against defendants, James S. McKee, Nellie Canon Bliven, executrix of William E. Bliven, deceased, and McKee and Bliven Button Company (a partnership composed of said McKee and said William E. Bliven) engaged in the button manufacturing business at Muscatine, Iowa, to recover for the conversion by them of a quantity of mussel shells theretofore taken from certain lands in Pemiscot County, Missouri; and the cause was removed to the District Court of the United States, Eastern Judicial District of Missouri, because of diverse citizenship.

Said petition, as amended, contains two counts (Tr. 12-13) and shows that the plaintiff prosecuted his action as assignee of St. Louis Union Trust Company and Himmelberger-Harrison Lumber Company, the owners, in possession, of the lands from which the shells were taken: these lands were particularly described as comprising a single tract, much greater in length than width, and of which the Trust Company

owned 1,314 acres and the Lumber Company 125 acres.

By the *first count* (Tr. 12) it is alleged that the defendant, McKee, and said William E. Bliven, deceased, in 1913 and 1914, "willfully, wrongfully and illegally took and carried away to said city of Muscatine, Iowa, three hundred seven and one-half (307½) tons of mussel shells from said lands" and that they "converted said shells to their own uses and purposes" and that the converted property "became and was then and there in their possession of the value" of $28,290 for which a judgment, with interest from date of demand, is prayed.

By the *second count* (Tr. 13) of said petition the plaintiff, additionally, alleges that the said defendant, McKee, and the said William E. Bliven, "without the consent or authority of plaintiff or of the owners of said lands, willfully, wrongfully and illegally gathered, dug up therefrom, and carried away and converted to their own use said shells as aforesaid, which said shells were then and theretofore a part of the realty of said lands growing thereon and forming and constituting a part thereof, and that neither said McKee nor said William E. Bliven had any interest or right in any of said lands or in any of said shells"; and that, by SECTION 5448 of the Missouri statutes (see p. 35, *infra*) the defendants became and are liable for three times the value of said converted property, for which judgment is also prayed.

The amended *answer* (Tr. 17) of the defendants, besides a general denial, pleads (1) that the shells were purchased by them in the "open market" without notice of ownership and (2) that said shells were taken with the consent of the owners of said lands. Other allegations therein, containing a supposed estoppel, were ordered stricken out (Tr. 18, 20).

A *reply* (Tr. 18) denies the remaining allegations of said answer.

After a *trial* in the District Court, a peremptory instruction, to find for the defendants, was given, upon the sustention of a demurrer to all of the evidence, and judgment accordingly was entered (Tr. 22) pursuant to an oral opinion, by POLLOCK, J., which appears at page 119 of the Transcript.

Thereupon a writ of error was allowed upon the filing of certain assignments of error (Tr. 123) by said plaintiff; and then there followed an opinion (Tr. 130 and 258 Fed. 335) in the Court of Appeals, by JUDGE CARLAND, affirming the trial judgment.

A petition for a *rehearing* (Tr. 134-141) was afterwards granted (Tr. 142) and the case was argued again, and, on Nov. 13, 1920, a judgment of reversal and remand was rendered (Tr. 151) by the Court of Appeals (JUDGES CARLAND and HOOK sitting) upon the filing of an opinion (270 Fed. 713), by VAN VALKENBURGH, J., printed at page 143 of the Transcript.

This ruling of the Court of Appeals adjudged that

the defendants were liable to the plaintiff for the value of the property converted; but denied plaintiff recovery for the value of the buttons (or manufactured product of said shells) and denied the applicability of the treble-damage statute of Missouri, the Court being of opinion that the trespass was not willful and that said statute did not cover a trespass of this kind.

Defendants then filed a petition for a rehearing (Tr. 152) and plaintiff filed *a motion for modification* (Tr. 153) of the second opinion, each of which was overruled (Tr. 159) pursuant to a PER CURIAM opinion (Tr. 158); and, thereafter, on April 11, 1921, the parties submitted their respective petitions for certiorari in this Court, and the WRIT was granted.

The Facts

of this controversy, as shown in evidence, to which as stated a demurrer was sustained, will now be shortly stated; and, right here, it should be noted that each of the pretended defenses, set up in the defendants' said answer in this case, wholly failed for want of any proof whatsoever even tending to sustain it.

Land Titles.—A perfect fee-simple record title, in plaintiff's assignors, to the lands from which the shells were taken, was proven, and now appears to

be conceded. Said lands, located in the Southeastern portion of Missouri, passed from the General Government to that State, under the Act of Congress, of September 28, 1850, pertaining to swamp, or overflowed, lands; and, from said State to the county of Pemiscot, and, in 1903, from the latter to the assignors of plaintiff to whom the cause of action here was later duly assigned (Tr. 25-28).

Plaintiff also introduced in evidence two photolithographic plats of said lands, showing the boundaries thereof and the acreages of the sundry numbered lots therein, as prepared in the General Land Office (Tr. 25); but the channel of the so-called "Little River" (while somewhere within said boundaries) "is not marked or shown" on said plats (*id.*). An Exhibit, on page 137 of the Transcript, shows the contour, lot numbers and acreages of a portion of said lands, and is typical of all of same.

From the foregoing, it will be seen that every foot of the lands described in this case (somewhere within the boundaries of which trickled the erratic Little River) was surveyed, by additional surveys, in 1875, by the Government, and, later, conveyed to plaintiff's assignors, as stated.

Furthermore, said owners were in the possession thereof through an agent, Warren, who was a caretaker to look after the timber thereon (Tr. 38, 45, 90, 110).

The Trespass or Conversion.—That the defendants obtained 9 car-loads, or 614,100 pounds, or more than 307 tons, of said shells, in 1913 and 1914, was proven (Tr. 29, 30, 31, 49) and, later, admitted.

James Figg (whose name seems not to be mentioned in the learned brief of opposing counsel) was defendants' representative (Tr. 45, 52) and shell finder and buyer; and, for such purpose, he visited different localities over the country (Tr. 91). In 1913, before defendants secured many shells from said lands (Tr. 88), Figg went to Wardell, a railroad station within the area of said lands and from which all shell shipments were made (Tr. 31-2), and looked over and traversed the field there (Tr. 96, 97). With the view of obtaining shells, and pursuant to the defendants' instructions (Tr. 92), he interviewed one William A. Blake, a native of no financial means, and explained the relative values and desirability for manufacturing purposes of the several kinds of shells, and then reported to the defendants that Blake was reliable and could be trusted for the purpose of shipping shells (Tr. 43, 77, 88).

Defendants in this way made Blake their local representative, and begun advancing him money (Tr. 82, 85, 115, 116) with which to conduct operations; and the latter then employed a number of other local people to gather shells from said lands and ship same to

the defendants (Tr. 35) at Muscatine, Iowa, where same were manufactured (Tr. 51) by defendants into buttons for commercial use.

Other facts in evidence, including defendants' admissions (Tr. 33, 38, 44-45), tending to prove Blake's agency in the matter, and, also, the willful nature of the defendants' trespass, are referred to below, at pages 31-33, in our argument upon the measure of damages.

The defendants deny that Blake was their agent; but, while we submit that the evidence satisfactorily shows that he was their agent, yet, as a demurrer to all of the evidence was sustained, we may, for present purposes, confidently assert what the evidence certainly tends to show in this respect.

Mussels and "Musseling."—The mussel is a bivalve, like an oyster, with shells, about the size of a man's hand, by the time when same is used for the commercial purpose of manufacturing buttons. The mussel grows and is found in watery beds, called shell-beds, usually containing large numbers, sometimes several acres in extent. Its locomotion is very limited. It remains substantially all of the time at the bottom of shallow water, largely imbedded in the mud. As long as its food supply is unimpaired, it is disinclined to move at all. Mussel-life is said to be spread around some with the assistance of the

fish to whose gills the very young mussel is, for a time, attached, until same drops off to begin to grow (Tr. 40, 42, 43). Scientific facts and natural laws, upon this subject, which are well known and which may be found in standard publications, have been judicially noticed; and accordingly one Court (101 *Wash.* 503, 172 *Pac.* 563), writing of clams, has observed: "The larvae are active, and swim freely upon the surface of the water, where they are borne and scattered in all directions by the winds and tides, until in a few days, the shells becoming heavier, they sink to the bottom, and, resting on seaweeds, stones, or other objects, become attached by byssus threads. Soon after they cease swimming they begin to burrow, if a suitable location is found."

The record contains some expert testimony for the defendants, concerning the nature and habits of the mussel, including the way by which the mussel moves: according to some of defendants' witnesses (Tr. 104, 107) a foot, or muscle, is extended and attached to some surface and the body thereby propelled by contraction; while other testimony for the defendants is to the effect that mussels "inflate themselves with air and open up and float down stream" (Tr. 109) and still other testimony from them that "Mussels move—I can't tell you the process or method" (Tr. 106). But this is believed to be immaterial to the case.

"Musseling" is the business of digging mussels out of the mud. This is done by a digger who wades in or uses a boat and who gathers the mussels up with his hands or with tongs (Tr. 33).

The mussels, in this case, when dug, were boiled (Tr. 33) by the diggers, on nearby dry spots (on *the same lands* above described), for the purpose of separating the shells (Tr. 42); *and said shells were then piled there,* where same remained, for from *ten days to a month* (Tr. 33, 43), until hauled away over said lands to Wardell, the station, at which place same were loaded into railroad cars and shipped to the defendants' factory at Muscatine (Tr. 33).

"Little River"—Its Non-Navigability.—Said lands, somewhere within the sinuous boundary lines of which (Tr. 42) the variable and crooked channel of this "river" had its course (see tracing on p. 137 of the Transcript), were what are known as swamp lands. At times, there would be water enough to float logs or small boats, in places, thereon; and, at times, the same lands would be practically dry, and such water as there then was would be standing therein in holes. "It seemed to run off in holes" (Tr. 33, 46).

After these waters flow through said lands, same begin to form, further South, especially after the Arkansas line is crossed, a small river that later, with

other waters, still further on, find way into the Mississippi.

Every ruling below, in this case, has characterized the marshy meanderings of the waters in question as non-navigable, and this is thought to be clearly correct (Tr. 36); but, as later argued, the character of said waters, as navigable or not navigable, is believed to be unimportant in this controversy.

The Questions Involved.—The Court of Appeals carefully considered the contentions (of supposed non-liability) now here urged by the other side, and adjudged that the plaintiff is entitled to recover from the defendants the value of the shells so converted by them. As the authorities cited below show, that conclusion is certainly right.

In arriving at said conclusion, the Court of Appeals classified the mussel as a fish, and a fish as a wild animal; and adjudged that the right of property therein is in the owner of the land, where such an animal is killed thereon by a trespasser.

However, we believe the learned ruling contains error in the matter of the measure of damages that ought to be applied. Therefore the plaintiff, or respondent-petitioner here, contends that:

1. The value of the manufactured product (the buttons) should be allowed as the proper measure of damages, in view of the nature of the trespass; and that

2. The Missouri statute (quoted later at page 35), allowing three times the value of the thing taken or converted, does, in these circumstances, also properly apply.

Some other facts are probably better stated further along under the several phases of the argument, particularly those going to show the willfulness of the trespass and conversion by said defendants.

SPECIFICATION OF ERRORS

The plaintiff below, BENJAMIN GRATZ, respondent-petitioner here, by counsel, respectfully specifies error, to his prejudice upon the merits, in the ruling (Tr. 143) of the learned Court of Appeals in the following particulars, to wit:

I

The Court of Appeals erred in adjudging, as a matter of law, that defendants' trespass was not willful (Tr. 151); and in thus foreclosing plaintiff's right to recover, as the proper measure of damages under the first count of his said petition (Tr. 12-13), the value of the product (the buttons) manufactured by defendants out of said shells, in event of the due judicial ascertainment of the nature of said trespass as willful.

II

The Court of Appeals erred in ruling (Tr. 144, 151) that the shells so taken and converted by the defendants could not be deemed to have theretofore been "substance or material" that was "part of the realty", within the meaning of the statute of Missouri (R. S. Mo., 1909, sec. 5448), quoted herein at page 35, allowing treble damages in these circum-

stances in such an event; and in thereby denying plaintiff's right to the measure of damages asserted in the second count of his said petition (Tr. 13-14).

WHEREFORE said plaintiff, or respondent-petitioner, by counsel, respectfully prays that for each of said errors, or for any other plain error, each of which was and is prejudicial to the substantial rights of plaintiff upon the merits of his cause, the said opinion and ruling thereon in the said Court of Appeals be reversed, modified or otherwise corrected; and that such other, further and proper relief be granted to plaintiff as may be deemed appropriate upon review by this Honorable Court.

S. MAYNER WALLACE
Counsel for Plaintiff or Respondent-Petitioner

BRIEF OF THE ARGUMENT

The argument following will be directed first **(Part I)** to answering the several contentions against legal liability, set forth in the learned brief of counsel for the petitioners-respondents and in the able argument of the "Amicus Curiae"; and then will follow, at page 30 hereof, our argument **(Part II)** upon the subject of the measure of damages.

PART I

The Property Appropriated

The *thing* that was taken and that is the subject matter of this case was an inanimate article of a recognized and well established commerce—the shell —and not an animal; and we, therefore, submit that much of the learning developed during this controversy is largely unnecessary to its decision. We believe the rights of the parties should be determined just as if the thing taken had been so much lime. It should be remembered that, after being dug, boiled and shucked, the shells were piled and stored, for from 10 days to 1 month, on the same lands, before being taken off to the factory (Tr. 33, 43).

There does not seem to be any more reason (it is respectfully submitted) for testing the ownership of said shell by the ownership of the live or dead mus-

sel, in these circumstances, than there would be for similarly testing the ownership of the bones of a dead buffalo now found buried on a dry farm in that community where such animal may have been killed by a marauding Indian in pioneer days.

Mussels—Animals Domitae Naturae—Property Ratione Impotentiae

But, if the law pertaining to the ownership of animals be applied, the earthy, harmless, inoffensive, phlegmatic *mussel* certainly ought not to be classed as a wild animal; but, rather, as a tame or domestic animal, in which event the land-owners' rights of property were, of course, absolute, at all times.

State v. Taylor, 27 N. J. L. 117, 72 Am. Dec. 347

Fleet v. Hegeman, 14 Wend. (N. Y.) 42, *l. c.* 45-46 (by JUDGE, later MR. JUSTICE, NELSON)

State v. Van Vlack, 101 Wash. 503, 172 Pac. 563

LORD NEAVES' opinion (at pages 38-41, *infra*)

The all-but-lifeless little mussel should, it is believed, be so classified (*domitae*, or *mansuetae*, *naturae*) upon principle. *Cessante ratione legis, cessat et ipsa lex.*

"Whether any particular animal be of one class or the other, is to be determined by our knowledge

of the habits of the class to which it belongs, as derived from the general observation and experience of naturalists."

Minor's Institutes, vol. III, p. 7

It has been adjudged that, "by the common law, as well as by the law of most, if not all, the States, dogs are so far recognized as property that an action will lie for their conversion" and that "they stand, as it were, between animals *ferae naturae* in which, until killed or subdued, there is no property, and domestic animals, in which the right of property is perfect and complete."

Sentell v. N. O., etc., R. Co., 166 U. S. 698

It has been said that even bees, usually classified as *ferae naturae,* must be regarded as very near the dividing line (between wild and tame animals) for they are so useful and common as to be all but domesticated.

Parsons v. Manser, 119 Iowa 88, 93 N. W. 86, 97 A. S. R. 283, 62 L. R. A. 132

Young pheasants, hatched and still brooded by a common domestic hen, are, until they revert to a state of nature, the personal property of the owner of the hen.

Reg. v. Garnham, 2 F. & F. (Eng.) 347

It has also been held that cattle, descended from domestic cattle carried by VANCOUVER to Hawaii in 1793, but which had for years roamed the mountains of the Islands there in a state of nature, could not, although in an actual condition of wildness, be regarded as animals *ferae naturae.*

Davis v. Green, 2 Hawaii 367, 375.

Animals Ferae Naturae—Rights Ratione Soli

However, if the property right here in question be deemed in any wise dependent upon the law governing ownership of *wild animals,* the plaintiff's rights are, nevertheless, equally clear in the light of the authorities.

Plaintiff asserts and the evidence tends to prove that defendants, through their agents, trespassed upon said lands and there took the mussels; and, where a trespasser reduces a wild animal to possession, the same thereupon becomes the absolute property of the owner of the soil.

Such is the common law as declared in England and as generally understood and applied here in America; and some of the leading cases are:

Blades v. Higgs, 11 H. L. Cas. 621 [*rabbits*]
Lonsdale v. Rigg, 11 Exch. 654 [*grouse*]
Arkansas v. Mallory, 73 Ark. 236, 83 S. W. 955, 67 L. R. A. 773, 3 Ann. Cas. 852 [*fish and game*]

Schulte v. Warren, 218 Ill. 108, 122, 75 N. E. 783, 13 L. R. A. (N. S.) 745 [*fish*]
Brown v. Eckes, 160 N. Y. S. 489, Ann. Cas. 1917 B, 981 [*bees*]

Where rabbits were killed and taken away and sold by a trespasser, it was adjudged by the HOUSE OF LORDS, in 1865, that the *Marquis of Exeter,* upon whose lands same were so found, was justified in having his servants take possession thereof, as being his property. The action was for the alleged conversion by those servants of the live and dead rabbits thus taken; and one plea of the defendants was that the rabbits were not the property of the plaintiff. Title thereto in the landowner was, however, sustained—the LORD CHANCELLOR (in the case first above cited) observing:

> "The question in the present case is whether game found, killed, and taken upon my land, by a trespasser, becomes my property as much as if it had been killed and taken by myself, or my servant by my authority.
>
> "Upon principle there cannot, I conceive, be much difficulty. If property in game be made absolute by reduction into possession, such reduction must not be a wrongful act, for it would be unreasonable to hold that the act of the trespasser, that is of a wrongdoer, should divest the owner of the soil of his qualified property in the game, and give the wrongdoer an absolute right of property to the exclusion of the rightful owner.

> "But in game, when killed and taken, there is absolute property in some one, and therefore the property in game found and taken by a trespasser on the land of A., must vest either in A. or the trespasser, and if it be unreasonable to hold that the property vests in the trespasser or wrongdoer, it must of necessity be vested in A., the owner of the soil."

And, concerning the case of the *Earl of Lonsdale* v. *Rigg, supra*, he further said:

> "I entirely concur in the observations of MR. JUSTICE BLACKBURN, and consider that case as a conclusive authority upon the point before us, which it is not desirable to question or disturb.
>
> "The case, when properly considered, amounts to this: grouse were shot and taken away by a trespasser upon and from the land of the Plaintiff, who brought trover for the dead grouse, and it was clearly held by the judges of the COURT OF EXCHEQUER, and afterwards by all of the judges in the COURT OF ERROR, that the grouse as soon as they were killed and fell upon the land of the Plaintiff, became and were his absolute property in respect of his ownership of the soil."

Blades v. Higgs, 11 H. L. Cas. 621

By the decision, in 1893, of the arbitrators in the Behring Sea seal controversy between the United States and Great Britain, the common law rules governing ownership of wild animals by individuals were

made a part of international law with respect to the ownership of wild animals by the nations.

Behring Sea Arbitrators' Decision, 32 Am. L. Reg. & Rev. 901 (909-910)

Nothing whatsoever in *Geer v. Connecticut*, 161 U. S. 519 (relied upon somewhat by counsel for the other side) is adverse to the foregoing doctrine.

The "question for review" in that case was whether a State statute, creating the offense of having certain game birds in possession for the purpose of transporting them beyond the State, was violative of the interstate commerce clause of the Constitution of the United States; or, "had the State of Connecticut the power to regulate the killing of game"? (p. 522). No question of private property rights was involved or discussed; and the State's regulating authority over the subject matter was adjudged to follow from its police power (p. 534). Also, after extensive review, the Roman law was there said to place the ownership of wild game in all the people in common, while the common law of England regarded that such ownership was in the sovereign; and, in this connection, it may be noted that, at the time of the Norman Conquest and for many years thereafter, the right to kill game was held to reside in the Crown, partly on the ground that the king was lord paramount of the soil, partly on the ground that game as

bona vacantia belonged to the king by his prerogative.

> The Laws of England (HALSBURY),
> Vol. 15, pps. 211-212

Defendants cite 11 *Ruling Case Law,* p. 1039, to the effect that the landowners' only remedy, in these circumstances, is trespass *quare clausum fregit* and not trespass *de bonis asportatis*: this declaration of law is based solely upon Beach v. Morgan, 67 N. H. 529—which is the result of an exceptional rule, existing in some of the New England States, wherein, by an old law, fishing is free even in private waters. But the common law, generally prevailing elsewhere, is different, as is explained in

> Percy Summer Club v. Astle (C. C. A.), 163 Fed. 1, and
> Hardin v. Jordan, 140 U. S. 371 (393).

The State Statute

(1) The Missouri statute of 1905 (being Section 6508 of R. S. Mo., 1909, and Section 5581 of R. S. Mo., 1919, and quoted at pages 49-50 of defendants' brief) providing that title to all birds, game and fish shall be in the State "for the purpose of regulating and controlling the use and disposition of the same" is not adverse to plaintiff's position, even if it be

said, *arguendo,* that damages are sought for the taking of the mussel rather than for the shell.

The opinion of the Court of Appeals, after reviewing the same very carefully, announced that conclusion (Tr. 148 to 150) respecting the intent and meaning of said statute.

The opposite construction would, it is submitted, render such an enactment unconstitutional if applied in circumstances here disclosed.

Another reason, however, why the statute has no present application is this: it refers only to game, fish and birds that are "not now held by private ownership". As stated above, this enactment was in 1905; whereas plaintiff's assignors legally acquired their said lands two years prior thereto, in 1903 (Tr. 26, 27).

But the statute only intends to make effective the State's police-power-interest and does not intend to affect the citizen's private-property-ownership as developed in the course of the common law. No statutory relation to the subject of the individual interest was meant.

Since MAGNA CHARTER and the CHARTER OF THE FOREST, the ownership of birds, fish and game, so far as vested in the sovereign, has been uniformly regarded, not in a proprietary sense, but as a trust for the benefit of all the people in common.

The Supreme Court of Arkansas, in the leading case below cited, said:

> "But nowhere do we find that in modern times has the absolute and unqualified ownership of such animals (*ferae naturae*) by government been asserted and exercised further than for the purposes of controlling and regulating the taking of the same. On the other hand, we find frequent denial of the right of government to do more."

The Supreme Court of Illinois, in the case in that court below cited, has concurred in and adopted the foregoing declaration of law. In fact, there appears no different ruling by any court.

That the State had no proprietor's interest or title in the mussels or in the shells; that its statute has to do only with regulation and protection of fish, game and birds; and that this police power concern extends to that that is privately owned as well as to that that is publicly owned is the doctrine of the authorities:

Hartman v. Tresise, 36 Colo. 146, 84 Pac. 685, 4 L. R. A. (N. S.) 872
Arkansas v. Mallory, 73 Ark. 236, 83 S. W. 955, 67 L. R. A. 773, 3 Ann. Cas. 852
Schulte v. Warren, 218 Ill. 108, 75 N. E. 783, 13 L. R. A. (N. S.) 745
Rogers v. Jones, 1 (Wend.) N. Y. 237, *l. c.* 260 *et seq.*, 19 Am. Dec. *l. c.* 501
State v. Blount, 85 Mo. *l. c.* 547
State v. Weber, 205 Mo. *l. c.* 46-47

(2) Furthermore, defendants, charged as trespassers, are in **no position** to assert that title to the property converted by them is or was in the State or in any other third party.

The landowners' possession, and right to the possession, of said shells (dug and stored as aforesaid on their said lands), as against defendants, who had no better, or any, right or title, is, in and of itself, sufficient. The *jus tertii* is not available to defendants.

Therefore, no inquiry, into the title to said shells, properly arises here.

Armory v. Delamirie (Smith's L. Cas.), 1 Str. 504
U. S. v. Loughrey, 172 U. S. 219
Peru, etc., Co. v. Harker (C. C. A., 8th Cir.), 144 Fed. 673
Rosencranz v. Swofford Bros. Dry Goods Co., 175 Mo. 518, 75 S. W. 445, 97 A. S. R. 609.

Concerning the Waters

(1) It is insisted by the other side that the waters in question were navigable; but the fact of navigability *vel non*, under the present record, is a question which is probably not now open: the trial court found that the waters were not navigable (Tr. 119).

The opinion of the Court of Appeals (Tr. 144 to

146) demonstrates that said waters were non-navigable in fact and in law; and we may now add

> Brewer-Elliott, etc., Co. v. United States (C. C. A.), 270 Fed. *l. c.* 102 and 103

respecting the non-navigability of the Arkansas river above the mouth of Grand river.

CONGRESS has enacted that this "Little River" should not be regarded as navigable at a point further south, in Arkansas; and any doubt that might otherwise have existed, as to the condition of the waters mentioned in this case, seems thereby to be dispelled. (See ACT of Mar. 2, 1919, c. 95, sec. 4, 40 Stats.).

A very late case in the Missouri Supreme Court is further authority for the position that the waters referred to should not be regarded, in that State, as navigable in any sense of the word.

> Slovensky v. O'Reilly (Mo.), 233 S. W. 478, *l. c.* 481-2

That case adjudged the Meramec river to be not navigable, and referred to the fact that the Current river had been likewise classified; yet we find the defendants mistakenly arguing in their brief (p. 70) that these very "rivers" are navigable!

(2) But, even if said waters had been found to be navigable, the law governing the rights of the parties

would still be the same; for the general right of user of such a navigable stream is strictly limited to highway purposes.

Hobart-Lee Tie Co. v. Grabner (Mo. App.), 219 S. W. 975

The public right of navigation does not include or give the right to fish, hunt or trap where title to the underlying land is privately held.

Annotation, 11 A. L. R. 241
Schulte v. Warren, 218 Ill. 108, 75 N. E. 783, 13 L. R. A. (N. S.) 745 [*fish*]
Johnson v. Burghorn, 212 Mich. 19, 179 N. W. 225 [*muskrats*]

Defendants are in error in assuming (p. 63 *et seq.* of their brief) "that public navigation and public fishery go hand in hand." The Wisconsin case (*Willow River Club v. Wade*) there cited by them proceeds upon facts that are different from those at bar, while the decision in that case is rested upon the supposed authority of two New Hampshire cases the doctrine of which, as herein pointed out at page 22, is founded upon an exception to the common law rule prevailing outside of certain of the New England States; and, even if the Michigan case (*Lincoln v. Davis*), cited by them (p. 68), furnished defendants any support, the same was withdrawn by the much later case of Johnson v. Burghorn, *supra,* from that State, exactly in point here.

(3) That the plaintiff's assignors had and possessed the *exclusive right of fishing* in and on the lands described in this case is clear from the foregoing, and from the following, authorities:

Hardin v. Jordan, 140 U. S. 371 (388, *et seq.*)
State v. Blount, 85 Mo. *l. c.* 547
Thompson v. Tennyson, 148 Ga. 701, 98 S. E. 353
Hartman v. Tresise, 36 Colo. 146, 84 Pac. 685, 4 L. R. A. (N. S.) 872
State v. West Tenn. Land Co., 127 Tenn. 575, 158 S. W. *l. c.* 752
Hooker v. Cummings, 20 Johns (N. Y.) 90, 11 Am. Dec. 249.

"Implied License"!

Defendants argue (their brief, pps. 69-72) that there was a "custom" to take these shells and (p. 72) that, therefore, they had *an "implied license"* to validate this trespass.

Conceding, *arguendo*, that the record now authorizes a review of this question, and assuming that the evidence supports defendants' contention (but, clearly, it does not), the reply thereto is complete.

The amended answer (Tr. 17), even reading therein the parts thereof that were stricken out (Tr. 18, 20), contains *no plea* of any custom or of any implied license. Said answer does allege "consent"; but, of course, there is no evidence thereof in this case.

Furthermore, as matter of fact, this record furnishes no basis whatsoever for the claim of license, because, as pointed out at page 31 hereof, Blake, defendants' agent, previously endeavored unsuccessfully to obtain consent to the taking of the shells, and, as is also shown (pp. 31-2, *infra*), these defendants persisted in getting said shells even after notice.

Custom, from which any benefit may be derived, must be a lawful custom. Even then it sometimes fails to affect rights given by the common law. Recently, it was adjudged that long usage and local custom of the people to permit fowls to run at large did not excuse their trespasses on a neighbor's premises; and their owner was held liable, because of common law, for damages thereby caused, notwithstanding the custom.

Adams v. Clark, 189 Ky. 279, 224 S. W. 1046

Besides, this alleged and asserted right to hunt or fish, on the lands of plaintiff's assignors, is a claim to a *profit a prendre*; and the law seems clear that

> "a claim by custom to enjoy a *profit a prendre* in the soil of another is invalid and insupportable, for the reason that to allow such a claim would result in the destruction of value in the subject of the *profit*."

(9 R. C. L. p. 745 and *ca. ci.*)

PART II

The Measure of Damages

Plaintiff, or respondent-petitioner, respectfully urges a correction of the ruling (Tr. 144, 151) in the Court of Appeals, concerning the proper measure of damages, for the predatory acts of these defendants.

It is submitted, in view of the nature of defendants' trespass, that **the value of the manufactured product**, into which the shells passed, furnishes the proper measure of damages recoverable under the first count (Tr. 12-13); and, also, that the Missouri statute, quoted later and allowing treble damages in certain instances, applies and is sustainable under the second count (Tr. 13-14).

Our statement of the facts (*supra*, pp. 7-8) will be enlarged only to the extent of pointing out the evidence (to which, as already stated, a demurrer was sustained) tending to show the willfulness of the defendants' trespass.

First, with respect to the damages under the *first count*:

The Court of Appeals has erroneously undertaken (Tr. 151) to decide, as a matter of law, what, under proper instruction, should be for a jury to find—the

facts, from which the character of the trespass may be determined.

What are those facts?

To begin with, defendants were obliged to admit that they cared not, and made no inquiry, concerning ownership, prior to their getting said shells (Tr. 81-82).

Blake, admittedly defendants' agent after the trespass (Tr. 56), and accused (*supra*, pp. 7-8) by the plaintiff all through this record with having been their agent in the commission of said trespass, asked for, but did not obtain (Tr. 88-90), permission, to take said shells, prior to the time when, in 1913, he started shipping shells to said defendants. *His effort was to secure a "lease" of the river.* We may infer that later in due season he communicated this important item of information to his then principals, the defendants; nevertheless, if he be found to have been their agent in the commission of the trespass, his notice and knowledge in this particular became their notice and knowledge (*The Distilled Spirits*, 11 Wall. 356) and they are now chargeable therewith.

And, after being *warned* of the landowners' rights and intention to sue (Tr. 47-49), said defendants nevertheless also took and converted the last, or ninth, car of said shells (Tr. 49). The first eight cars were consigned by Blake to the defendants; but this

last one went forward to the order of Blake who endorsed the bill of lading to them (Tr. 30, 49-50).

> [It may be mentioned here that, after said notice and before this action was instituted at St. Louis, there was a trial of this case at Davenport, Iowa, in October, 1916 (Tr. 53, 63); and the fact explains the silence of this record upon the subject of any further demand prior to the present action.]

Also, since the beginning of this litigation, said defendants have refused to produce and have attempted to conceal and have *destroyed* evidence against them (Tr. 52-61, 62-69, 70-75).

The defendants and Blake even stooped to practice a deception whereby the native diggers were, to quote defendant McKee, "hornswoggled" (Tr. 84). This cheat was accomplished by the issuance by defendants to Blake of two checks every time money was transmitted to the latter who would then show only one check to the diggers in substantiation of the representation that that was all he, Blake, was receiving from the defendants for the shells (Tr. 78, 84).

The only semblance of a defense in this case appears to be some kind of an attempt to invoke the alien doctrine of the *Market Overt*. In their amended answer (Tr. 17), defendants plead that the shells were bought in the "open market", and the defendant McKee swore that the defendants had "no

knowledge or information as to where the same were obtained"! (Tr. 50) Also, in said answer (Tr. 17), we find the plea that said shells were taken with the "consent" of the landowners!! Any reading of this record proves the utter falseness of the answer and the oath.

While, as just stated, the defendant, McKee, in one place (Tr. 50), swore that the defendants had "no knowledge or information" about where the shells came from, later on, at another time, he testified: "I knew they came from down in the Little River district, from the fact that they were shipped from Wardell!" (Tr. 77.) And, concerning said Blake, while the said defendant insists that the latter's *only purpose* in sending Figg down to investigate Blake was to ascertain the latter's integrity and character and determine if Blake was "worthy" of loans, yet, we also find that, at the very time "a favorable report" on Blake was being received, the said defendant was readily entering into Blake's scheme, above mentioned, to "hornswoggle" the native diggers!! (Tr. 77-78, 84.)

It is respectfully submitted that the evidence shows defendants to have been willful trespassers in fact, and that their depredations were flagrantly and consciously tortious; and that the highest measure of damages, as contended for, ought properly to be applied.

In these circumstances, *the value of the manufactured product* is the just and lawful measure.

Union Naval Stores Co. v. United States, 240 U. S. 284—

the doctrine of which (a direct authority squarely in point) was recently again applied in a case where a trespasser, who extracted and sold oil from public land, claimed under a mineral location made with knowledge that the land had been withdrawn from appropriation; and he was held liable for the value of the oil, without deduction for costs of operation or for royalties paid, notwithstanding he had sought and obtained the opinion of counsel which was held not to make the trespass one that was committed in good faith.

Mason v. U. S. (C. C. A.), 273 Fed. 135

This has long been the law in Missouri:

Gray v. Parker et al., 38 Mo. 160
Sligo Furnace Co. v. Tie Co., 153 Mo. App. 442, 134 S. W. 585

An exhaustive review of the cases, including those having to do with what constitutes willfulness, is contained in an opinion and annotation in

7 A. L. R. 901, *et seq.*

In the trial court, plaintiff duly offered proof of the value of the shells at Muscatine, and of the value of the buttons there manufactured by the defendants therefrom (Tr. 36-38, 51); and, in the Court of Appeals, error in the ruling hereon was duly assigned (Tr. 124-5).

Secondly, concerning the damages recoverable under the *second* (Tr. 13-14) *count*:

In brief, the statute therein pleaded and relied upon provides that, for the conversion of any "*substance or material being a part of the realty*", the trespasser shall be liable for three times the value of the thing taken; but the Court of Appeals, while recording a grave doubt, ruled that said statute did not apply (Tr. 144, 151).

The statute in full is this:

> "If any person shall cut down, injure or destroy or carry away any tree placed or growing for use, shade or ornament, or any timber, rails or wood standing, being or growing on the land of any other person, or shall dig up, quarry or carry away stones, ore or mineral, gravel, clay or mold, or any ice *or other substance or material being a part of the realty*, or any roots, fruits or plants, or cut down or carry away grass, grain, corn, flax or hemp in which he has no interest or right, standing, lying or being on land not his own, or shall knowingly break the glass or any part of it in any building

> not his own, the person so offending shall pay to the party injured treble the value of the thing so injured, broken, destroyed or carried away, with costs." (*Italics ours.*)
>
> R. S. Mo., 1909, sec. 5448; R. S. Mo., 1919, sec. 4242

It is now conceded that the defendants claimed "no interest or right" in the lands (Tr. 51, 85).

Assuming, again, that the thing taken was the mussel (and not the "acres" of shells which previously had been dug and shucked and stored in piles on the nearby dry land) it is submitted that the case is within the broad terms, and clearly within the plain intent, of the statute quoted. In other words, the thing taken, or so excavated, is comprehended by the phrase "other substance or material being a part of the realty."

"A shell is comprised principally of lime; about ninety-five per cent lime" (Tr. 41); "the greater part of the chemical material forming these shells is calcium carbonate; and some calcium phosphate" (Tr. 105); and, according to the Century Dictionary, lime is "an alkaline earth".

The Court of Appeals observed (Tr. 151) that over 300 tons of these mussels were "dug from the soil", beneath the water, "upon private lands". The defendant, McKee, said: "They are dug up from the bottom of the bed" (Tr. 80); and one of his witnesses

also testified (Tr. 105) that they "are dug out of the bed" of the river, while other testimony (Tr. 42) is to the effect that "a part of them would be almost buried in the mud".

Can it be doubted but that a fee simple grant of this land, by metes and bounds, would have included said shells in their natural state? (See State v. Van Vlack, 101 Wash. 503). Or that even animals *ferae naturae*, at large upon an estate, are regarded as part of the inheritance or of the realty? Can there be any doubt about the proposition that the taking of the pearls, growing and found in said shells, is an injury to the realty? Or that same are anything but parts thereof?

If the attribute of life alone, no matter how low the form, be deemed to make a thing separate from the realty on which it exists, then waterlilies and worms, in their natural state in the soil, must be looked upon only as personalty.

We are not without some high authority for the contention that the mussels (in their natural state) were "substances" or "materials" that were "a part of the realty".

In a book (probably the oldest book of the COMMON LAW) we find the record to the effect that:

> "Waste for fish in a pond was adjudged good, etc."
> *Statham's Abridgment (Klingelsmith's), Volume 11, page 1253*

We beg your HONORS' further indulgence with the following remarks of LORD NEAVES, in a case dealing with mussel-scalps, the British way (6 Oxford Dict. p. 780) to describe mussel-beds:

> "With regard to mussel-scalps, which are the things here in question, I consider these to be *partes soli* from their nature. I look upon them as part of the inheritance of the estate. The nature of the fish is important in this case. Its habits are well explained in the paper for the pursuer, and it is an important part of the case, upon which my opinion very much turns. The mussel has powers and organs of locomotion, which it puts in operation particularly early in life; but when it has once settled down and fixed its domicile, it seems to do so *animo remanendi*, and there it remains generally for the full period of its life, till dislodged by some violent means, or till some other extraordinary circumstance occurs. Being there, it is attached to the soil with a peculiar tenacity that is very remarkable in the natural history of the animal; so much so, that I cannot doubt that it is a trespass and encroachment upon the soil if any one takes from it any settlement of these animals that is so attached. *There may be some difference between an animal and a plant in this respect; but it is not very easy to see the difference, and I do not think there is any.*" (p. 213) [*Italics ours*].
>
> Duchess of Sutherland v. Watson (1868), 6 MacPher. 199 (6 Scot. Sess. Cas., 3rd Ser., p. 199)

And, in that case, it was also, by the LORD JUSTICE-CLERK, observed:

> "My impression is, that floating fish may be captured from boats by any of the lieges though the *locus* may be a bay, and though there be a grant of fishings in the sea conferred by crown charter on the proprietor of the neighbouring land. In this respect floating fish, which are unconnected with any locality, and appear in different portions of the sea, without any one knowing from whence they have come or being able to predict whither they are to go, stand in complete contrast to mussels, which, as LORD NEAVES has said, adhere with wonderful tenacity to the rocks or shores with which they are connected, *and are practically fixtures, and parts of the soil.* But though the fishing of floating fish is free to the lieges, and mussels are used as bait, it does not follow that bait is or ought to be free to be taken by any fisherman. The same principle would give him right to enter private grounds in order to take worms,—a result manifestly absurd". (p. 215) [*Italics ours*].

That case was referred to in

> Parker v. Lord Advocate (1902), 4 Sess. Cas. 5th Ser., p. 707

where, at pages 710-711, it was said by the LORD PRESIDENT:

> "The undoubted right of the Crown, in former times at all events, to alienate mussel scalps to a subject has by some Judges been

explained upon the ground that mussel scalps and the mussels in them are *partes soli*, and could be conveyed to a subject in the same way as any other *pars soli*. While this consideration is not to be disregarded, and while the position of mussels in a scalp *is not dissimilar to that of trees or other vegetation growing on land*, or to seaweed on kelp shores, which were frequently made the subjects of grant, I think that the safer ground upon which to rest my opinion is that the right to a mussel scalp and the mussels in it is similar to the right to any other heritable estate in Scotland, *although the circumstance that mussels are so closely associated with the ground that it may correctly be said that they are parts of it*, may have been one of the reasons which originally led to mussel scalps being regarded and treated as patrimonial property. The scalps are certainly, apart from the living mussels, *partes soli*, generally consisting of an aggregation of material, often of considerable thickness, and composed in no small measure of mussel shells and other remains of dead mussels. This close connection of mussels with the ground may, in their case as in the case of oysters, have led to their being treated differently *by custom, decision, and legislation* from floating fish (other than salmon) in the sea or in tidal waters, the right to take which is now free to all." (*Italics ours*).

The last mentioned case was affirmed by the HOUSE OF LORDS in very complimentary terms; the LORD CHANCELLOR remarking that there was no difference

in the law applied between the law of England and that of Scotland.

Parker v. Lord Advocate (1904), 6 Sess. Cas. 5th Ser., p. 37

Some interesting applications of the instant contention are to be found:

"It is well settled that, under some conditions, water and ice are to be regarded as real estate, belonging to the owner of the land which is beneath it."

Marsh v. McNider, 88 Iowa 390, 395

A meteorite or aerolite, though not imbedded in the earth, was held to be part of the realty—notwithstanding a contention that, because the Indians had been using it as a medicine rock, it should be deemed severed and treated as personalty.

Oregon Iron Co. v. Hughes, 47 Oregon 313

Likewise, oil and gas, when dormant in the earth.

Barnett, etc. Co. v. Oil Co., 254 Fed. 481 (488)

A section of the Missouri statute, governing statutory construction in that State, provides, *inter alia*, that

"* * * the terms 'real property' or 'premises', or 'real estate' or 'lands', shall be deemed to be

coextensive with lands, tenements and hereditaments."

R. S. Mo., 1919, section 7058

The *ab inconvenienti* argument, presented by the AMICUS CURIAE, suggests (p. 4) that the ruling of the Court of Appeals would give plaintiff the right to "follow the buttons onto the shirt manufacturer" and that "the wearer of practically any fur coat in this country would be liable at any time to a suit for conversion by the owner of land upon which the trapper trespassed to catch the animal."

It may be noted that a like situation arose in Canada a few years ago and was the occasion for an interesting deliverance by the Court of Appeal for Manitoba.

There, the husband of the plaintiff, without her consent, gave his wife's beaver skins to his lady friend who employed a furrier (at the husband's expense) to make them, and other skins, into a coat for herself; but it was adjudged (upon a consideration of English and American authorities) that the wife, who was not restricted to an action for damages, was entitled to replevin the finished coat as her property, without making any allowance whatever for the added skins or for the furrier's work.

Jones v. DeMerchant, 26 Man. 455, 28 D. L. R. 561

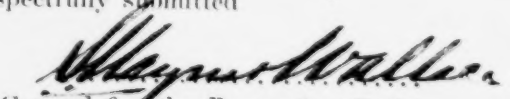
Like adjudications might, of course, be multiplied; but reference to only one other will be made: a case in New York where an owner of corn, taken by a trespasser, was held entitled to the whiskey manufactured therefrom.

Silsbury v. McCoon, 3 N. Y. 379

In conclusion it is submitted that the plaintiff, being entitled, under general principles of the Federal and of the applicable State law, to recover the buttons (or the pecuniary value thereof) manufactured by the defendants from his shells, is, by the express terms of the quoted statute of Missouri, also awarded three times "the value of the thing"; or, as prayed, the sum of $84,870, if the offered proof supports the damages as laid.

It is respectfully urged that the ruling of the Circuit Court of Appeals ought to be modified to the end that the proper measure of damages, recoverable by the plaintiff, be directed; and, as so modified, that the judgment of the Circuit Court of Appeals be affirmed.

Respectfully submitted



Counsel for the Respondent-Petitioner,
Benjamin Gratz

St. Louis, Mo.
April, 1922

FILED
OCT 27 1921
[illegible] NSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

JAMES S. McKEE, NELLIE CANON BLIVEN, Executrix of WILLIAM E. BLIVEN, and McKEE AND BLIVEN BUTTON COMPANY, a Partnership,
Petitioners,
vs.
BENJAMIN GRATZ,
Respondent.

No. [illegible]61

BRIEF AND ARGUMENT FOR PETITIONERS.

WILLIAM HOFFMAN,
ARTHUR HOFFMAN,
LON O. HOCKER,
FRANK H. SULLIVAN,
For Petitioners.

St. Louis Law Printing Co., 415 N. Eighth St. Main 1819, Central 919.

INDEX.

	Page
Statement	1
Allowance of certiorari	3
Pleadings	3
Ruling of District Judge	2
Ruling of Court of Appeals	3
The facts in the controversy	3
Specifications of error	12
Statutes and constitutional provisions quoted	14
Argument	19
Mussels generically considered	24
Title to fishes ferae naturae	30
The right of fishery in the Little River	54
Implied license	72

List of Authorities Cited.

Beach v. Morgan, 62 N. H. 529	20
Benson v. Morrow, 61 Mo. 345	22
Brown v. Peaslee, 69 N. H. 458	19
Caswell v. Johnson, 58 Me. 164	19
19 Cyc 988	20
Driscoll v. Lime & Cement Co., 37 N. Y. 637	23
Farnham on Waters, Sec. 1426	20
Gaston v. Mace, 5 L. R. A. 396	22
Geer v. Connecticut, 161 U. S. 523	20
Knowles v. Dow, 22 N. H. 387	23
Lincoln v. Davis, 53 Mich. 375	22
Marsh v. Colby, 39 Mich. 626	23
Martin v. Wadell, 16 Pet. 414	19
McCready v. Virginia, 94 U. S. 394	20
McKinney v. Northcutt, 114 Mo. App. 146	22
Missouri Constitution 1875, Art. I, Sec. 1	22
Mo. Laws 1905, p. 159	21
Id. 1909, p. 519	49
Mo. Rev. St. 1919, Secs. 3654, 5662 and 5663	69
Mo. Rev. St. 1919, Sec. 5581	21
Moulton v. Libbey, 37 Me. 472	19

Neild v. Burton, 49 Mich. 53 19
Noftsger v. Barkdall, 148 Ind. 531 23
Northern Pacific Co. v. Lewis, 162 U. S. 373 19
Parker v. People, 111 Ill. 603 20
Peters v. State, 96 Tenn. 682 20
11 R. C. L. 1039 20
State ex rel. Light Co. v. Longfellow, 169 Mo. 109 22
State ex rel. v. Warner, 197 Mo. 666 21
State v. Heger, 194 Mo. 707 21
State v. Theriault, 70 Vt. 617 20
State v. Weber, 205 Mo. 36 21
Stevens v. Howerton, 49 Ind. App. 151 23
Stewart v. Clark, 58 Am. Dec. 49 22
Strother v. Lucas, 12 Peters 445 23
Thayer v. James, 44 Wis. 388 23
United States v. Loughrey, 172 U. S. 213 19
U. S. Stat. Large, Vol. II, p. 743 59
Id., Vol. III, p. 545 59
11 R. C. L., p. 1015 19
Weston v. Samson, 8 Cush. 764 19
Webster v. Harris, 59 L. R. A. 324 22
Weller v. Mining Co., 176 Mo. App. 243 22
Willow River Club v. Wade, 42 L. R. A. 305 22

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

JAMES S. McKEE, NELLIE CANON BLIVEN, Executrix of WILLIAM E. BLIVEN, and McKEE AND BLIVEN BUTTON COMPANY, a Partnership, Petitioners, vs. BENJAMIN GRATZ, Respondent.	No. 282.

BRIEF AND ARGUMENT FOR PETITIONERS.

STATEMENT.

This is a writ of certiorari allowed here to review the ruling and judgment of the United States Court of Appeals for the Eighth Circuit.

The action was instituted in a state court in Missouri by Benjamin Gratz, the respondent, against the petitioners, James S. McKee, one of the partners in

the McKee and Bliven Button Company, and Nellie Canon Bliven, executrix of William E. Bliven, deceased, the other partner in that firm.

On application of the petitioners here (defendants in the action) the cause was removed into the District Court of the United States for the Eastern District of Missouri, because of diversity of citizenship (Rec., p. 6).

The plaintiff, Gratz, in the first count of his petition (Rec., pp. 12-13) alleged that his assignors were the owners of certain lands therein described situated in Pemiscot County, Missouri; and that the defendants had entered thereon and removed therefrom certain mussel shells, claiming the alleged value of the shells by way of damages; in a second count the same facts are alleged, plus an averment that the shells were a part of the realty, and judgment was asked for treble their value under a state statute referred to in the petition (Rec., pp. 13-14).

The answer of the defendants (Rec., p. 15) was a general denial with a plea of estoppel.

At the trial in the District Court, the learned District Judge directed a verdict for the defendants in a written opinion in which he held that the plaintiffs had shown no title to the shells because of the fact they were taken from live mussels captured in a state of nature in the stream (Rec., pp. 119-121).

On a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, that court, in an opinion by Mr. Circuit Judge Carland, concurred in by Mr. Circuit Judge Sanborn and Mr. District Judge Munger, affirmed the views and ruling of the District Court (Rec., pp. 130-134).

The plaintiff in the action (plaintiff in error there) applied for and was allowed a rehearing. On reargument the Court of Appeals, in an opinion by Mr. District Judge Van Valkenburgh, concurred in by Messrs. Circuit Judges Hook and Carland, reversed the judgment of the District Court, and its own prior ruling, held that the plaintiff had shown title to the shells, and remanded the cause for a new trial (Rec., pp. 143-151).

Whereupon, the petitioners here (defendants below, and defendants in error in the Court of Appeals) applied here and were allowed a writ of certiorari to review the ruling of the Court of Appeals (Rec., p. 162).

The facts upon which the rights of the parties depend as shown at the trial of the case in the District Court, are these:

The assignors of the plaintiff are the owners of the lands described in his amended petition (Rec., pp. 25-27). Whatever rights of recovery they may have had herein had been assigned to the plaintiff prior to the institution of the action (Rec., p. 28).

Their title to the premises originated in the Act of Congress granting swamp and overflowed lands to the State (Rec., pp. 25-27).

Through these lands flows a stream called Little River. This stream was not meandered in the Government survey of the swamp and overflowed lands (Rec., p. 25). Little River has its origin in the foothills of the Ozarks, and flows a distance of about 200 miles to a junction with the St. Francis River, which in its turn is a tributary of the Mississippi (Rec., pp. 88-46). At the point under inquiry here the stream is flowing through lands sunken by the New Madrid earthquakes, occurring around 1811, and is a slow, sluggish stream, the channel proper of which is from 50 to 100 feet in width. It is of various and variable depths, running through swamp lands now on one side of the channel, and now on the other. At some stages of water Little River is quite a stream, apparently; at others the water is low. It is not capable of navigation except with small boats propelled by hand-power or small gasoline launches and rafts of timber. It has been more or less subject to these uses for a long time. The roads in that part of the country are not of the best, and frequently the only method of travel and transportation is by means of small boats on this stream; the country appearing, however, to be thinly populated and the use of the stream correspondingly

infrequent (Rec., pp. 87-45-46-33). The inhabitants of the country have always resorted openly and publicly to the stream, not only for the purpose indicated, but for hunting water-fowl, trapping fur-bearing animals and fishing, without let, hindrance or objection from any source. Indeed, it appears that many of the inhabitants of the community depend on the stream for earning a livelihood in this manner (Rec., pp. 39-42-45-91). In this stream are to be found fresh water mussels. The biologist of the United States Department of Fisheries classifies this mussel as a shell fish (Rec., p. 104). They move about, albeit slowly, on the bottom of the streams which they inhabit (Rec., p. 104-105-108-40).

The shell of this mollusk, when it is taken from the water in a live state, is of value in the manufacture of pearl buttons; the shell of the mussel not taken alive is valueless (Rec., 92). The manner of taking them from the river varies with the conditions. If the water is deep, a drag is used following a boat; in water sufficiently shallow the operator wades the stream and takes the mussels from the bed of the stream either with his hands or with a fork. They are then taken to the bank, boiled so as to loosen the mollusk from the shell, and the latter are thereupon loaded in cars and shipped to market (Rec., pp. 33-42-43-80).

In 1907 (Rec., p. 85), the shell industry first began to attract the attention of the inhabitants of that country. It seems, however, that at that time the market for the shells was quite limited and very unsatisfactory (*Id.*). The industry of gathering the mussels and cooking them and recleaning the shells seems to have been conducted by the men who earned their livelihood hunting, fishing and trapping on the stream (Rec., p. 39).

Among those who became interested in the industry in Little River was one Blake. As early as 1908, he found the name of the petitioners (defendants in the District Court) in a commercial directory as button manufacturers, located at Muscatine, in the State of Iowa. Some time in that year he sent to the petitioners a sample of shells which he had taken in the manner indicated from Little River. At that time the petitioners apparently were not pleased with the quality of the shell, and advised Blake that they could not handle them.

In 1913, others of the community were taking the shells from the river and treating them in the manner indicated and selling them to other buyers. This revival of the activity appears to have occurred in 1912. Blake, having accumulated some shells, in conjunction with some of these individuals, wrote again to the defendants and sent them some more samples. Defendants replied to Blake's letter, after examining

the samples, with an offer of $9.00 a ton for the shells loaded on the car at the point of shipment. Blake then shipped a car, composed in part of his own production, and in part of that of others, and was paid the stipulated price (Rec., p. 86). About this time Blake asked the defendants for a small loan to assist him in buying shells, and the defendants, after sending a man down to that country to investigate his moral worth, let him have the requested funds (Rec., p. 77).

At various dates between July and October, 1913, Blake shipped the defendants eight such cars of shells, and in August, 1914, shipped them another car. The aggregate contents of these cars were 307 tons, for all of which the defendants paid Blake $9.00 per ton on board cars at the shipping point, paying the freight themselves to Muscatine, where their button plant was located (Rec., pp. 30-77). The defendants knew nothing about the point or points in the river from which the mussels were taken, as well as nothing about the ownership of the lands through which the river flowed. They knew, of course, that the shells were coming from the Little River District (Rec., p. 77). The point at which the shells were cooked and loaded on cars for shipment was a village and railroad station on the banks of Little River, situate on the lands of the plaintiff's assignors, called Wardell (Rec., pp. 31-32-42-45). Blake appears to have taken some

of the mussels from which the shells were procured from the river himself, and cooked them and loaded the shells in the car. He bought other mussels from others who took them from the river and attended to the cooking and loading of the shells himself; and in still other instances he appears to have bought the shells delivered in the cars at Wardell (Rec., pp. 86-87-88-44-31). During the period that Blake was thus acquiring shells and consigning them to the defendants, others were taking them from the river and supplying other dealers than the defendants therewith. The taking of the mussels from the river was conducted openly and publicly and without objection on the part of anyone. The assignors of the plaintiff had a man on the land who appears to have lived at Wardell, and whose duty it was to look after the premises, and who was apparently charged with preventing trespassers from taking timber from the lands. This man knew of the shell industry which was being conducted. Indeed, his team on occasion helped to haul the cooked shells to the cars in which they were loaded and shipped to market. (Rec., pp. 35-38-39-42-45-46-87.)

The first complaint with respect to this mussel industry appears to be a letter written by one of the assignors of the plaintiff to the defendants in June of 1914 (Rec., p. 47). This was a year, or perhaps more, after the industry had begun to be seriously

and assiduously conducted by the community (Rec., pp. 42-85), and about nine months after eight of the nine cars purchased by the defendants from Blake had been received by them and paid for (Rec., p. 30).

While, as stated, all of these nine cars of shells were cooked and loaded in the car at Wardell, on the premises of one of the assignors of the plaintiff, the testimony is quite uncertain as to where the mussels themselves came from—whether entirely from the river where it flows through the lands of plaintiff's assignors, or in part from the river where it flows through the lands of others.

A witness for plaintiff, named McClung, saw men who were gathering mussels for Blake working in the river at points where it flowed through the lands of the plaintiff's assignors, as he himself was having done at the time by other men, and thinks that two or three of the cars shipped by Blake to the defendants came from that point (Rec., pp. 34-35).

Another witness, Hickerson, took shells on these same premises and sold them to Blake, but knew nothing about the quantities which he took (Rec., p. 43). He saw others bring shells to Wardell and sell them to Blake, but had no knowledge as to the point on the river from which they had been taken (Rec., p. 46).

This was all that the plaintiff had to offer on that subject.

The testimony of Blake himself was to the effect that he obtained shells at various points on the river—some at points where the river was flowing through the lands of the assignors of the plaintiff, and some at points where it was flowing through the lands of others. He testified that he did not know the quantity of the shells which he shipped to the defendants taken from the river at points where it flows through the premises of the plaintiff's assignors (Rec., p. 88).

This comprises the entire showing on that question.

The testimony shows that the Little River mussel is of what is known as the "three-ridge" variety, which is quite a low grade shell and not nearly so valuable as other species (Rec., pp. 33-80-92-106). Mr. McClung, a witness for the plaintiff, expressed the opinion that in place in the river these mussel shells were of the value of $3.00 per ton (Rec., p. 37); although it developed that he had acquired the shells from the plaintiff in 1915, when the market was the same as 1913-1914, at $1.00 per ton in place in the river (Rec., p. 39). As we have stated, the defendants paid $9.00 per ton for the shells f. o. b. cars at Wardell, the point of shipment (Rec., p. 77). This, of course, included not only the intrinsic value of the

mussel shell as it lay in the river, but the labor and expense involved in taking the live mussel, transporting and assembling them on the shore, cooking and hauling the shells to, and loading the same in cars.

SPECIFICATIONS OF ERROR.

1. The Court of Appeals is in error in holding that, at common law, title to fishes and game taken by a trespass upon the premises of another vests in the owner of the premises upon which they were taken. (Rec., p. 148.)

2. The Court of Appeals is in error in holding that Section 1 of the Acts of the General Assembly of Missouri of 1905 and 1909 (Rev. St. of Mo. 1919, Sec. 5581) is but a regulatory enactment, and without effect upon title to game or fishes taken by trespass or other violation of law. (Rec., pp. 148-149.)

3. The Court of Appeals is in error in not holding that at common law title to game and fishes *ferae naturae* are acquired by reduction to possession, even though the thing be done on the lands of another without his consent. (Rec., p. 148.)

4. The Court of Appeals is in error in not holding and determining that, under the provisions of Section 1 of the Acts of the General Assembly of Missouri of 1905 and 1909 (Rev. St. 1919, Sec. 5581), title to game and fishes taken by trespass upon the premises of another vests in the state. (Rec., pp. 148-149.)

5. The Court of Appeals was in error in holding that the Little River, the *locus in quo*, was not a navigable stream. (Rec., p. 146.)

6. The Court of Appeals was in error in not holding and determining that the Little River was a navigable stream in the sense that it was subject to a public right of user, albeit title to its bed was in the riparian proprietor. (Rec., pp. 146-147.)

7. The Court of Appeals was in error in holding and determining that there was no public right of fishery in the Little River at the *locum in quo*. (Rec., p. 147.)

8. The Court of Appeals was in error in not holding and determining that an implied license existed in the vendors of the defendants to take mollusks from the Little River, which plaintiff's assignors, the owners of the premises, could only revoke after notice. (Rec., p. 147.)

STATUTES REFERRED TO.

The Act of Congress of June 4, 1812 (U. S. Statutes at Large, Vol. II, p. 743), for the organization and government of the Missouri Territory, contained the following:

> "The Mississippi and Missouri Rivers, and the navigable waters flowing into them, and the carrying places between the same, shall be common highways and forever free to the people of said territory and to the citizens of the United States, without any tax, duty or impost therefor."

The Act of March 6, 1820 (*Id.*, Vol. III, p. 545), authorizing the adoption of a constitution and the admission of Missouri into the Union of States, provided:

> "That the said state shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said state; so far as the said rivers shall form a common boundary to the said state; and any other state or states, now or hereafter to be formed and bounded by the same, and such rivers to be common to both; and that the river Mississippi, and the navigable rivers and waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of the said state as to other citizens of the United States, without any tax, duty,

impost, or toll, therefor, imposed by the said state."

Section 1, Art. I, of the Constitution of the State, of 1875 (the existing organic law), reads thus:

"*Section 1. Boundaries and Jurisdiction.*— The boundaries of the state, as heretofore established by law, are hereby ratified and confirmed. The state shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the state, so far as the said rivers shall form a common boundary to this state and any other state or states; and the river Mississippi and the navigable rivers and waters leading to the same shall be common highways, and forever free to the citizens of this state and of the United States, without any tax, duty, impost or toll therefor, imposed by this state."

Section 1 of the Act of the Missouri General Assembly of 1905, re-enacted in 1909, and now Section 5581 of the Revised Statutes of Missouri, of 1919, reads as follows:

"Sec. 5581. *Title to Birds, Fish and Game in State.*—The ownership of and title to all birds, fish and game, whether resident, migratory or imported, in the State of Missouri, not now held by private ownership, legally acquired, is hereby declared to be in the state, and no fish, birds or game shall be caught, taken or killed in any man-

ner or at any time, or had in possession, except the person so catching, taking, killing or having in possession shall consent that the title of said birds, fish and game shall be and remain in the State of Missouri, for the purpose of regulating and controlling the use and disposition of the same after such catching, taking or killing. The catching, taking, killing or having in possession of birds, fish or game at any time, or in any manner, by any person, shall be deemed a consent of said person that the title of the state shall be and remain in the state, for the purpose of regulating the use and disposition of the same, and said possession shall be consent to such title in the state."

Section 34 of the Act of 1909, now Revised Statutes, 1919, Section 5628, reads as follows:

"Sec. 5628. *Pearl Fishing Prohibited—What Seasons.*—It is hereby declared unlawful for any person to engage in what is commonly known as 'pearl fishing' in any of the waters of this state at any time during the months of March, April, May and June. Any person violating the provisions of this section s hall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense."

N. B.: The remainder of the enactments of 1905 and 1909, were detailed regulations of the taking of

game and fish, and are not thought to be pertinent to the present inquiry.

Revised Statutes of Missouri, 1919, Section 3654 (which was Revised Statutes, 1909, Section 4859) reads as follows:

> "Sec. 3654. *Taking Fish from Private Pond Prohibited.*—Any person who shall enter upon any lands for the purpose of taking fish from any private pond or other artificial waters, or who shall take any fish from such pond without the consent of the owner thereof, shall, in addition to any damage recoverable by law for trespass, be liable to the owner, lessee or occupant of the land on which such pond is situated for the value of the fish so taken, and the penalty of twenty-five dollars for each offense (R. S. 1909, Sec. 4859)."

Laws of Missouri, 1911, page 202, and Laws, 1913, page 224, are enactments which are now Sections 5662 and 5663, Revised Statutes, 1919, wherefrom we quote their provisions thus:

> "Sec. 5662. *Trespass—Hunting.*—Every person who shall be found hunting, with gun or dog, upon the enclosed, improved or cultivated lands of another, or shall enter the same to catch or kill game of any kind, without the consent of the owner or person in charge of such lands, shall, on complaint of such owner or person in charge of such lands, and upon conviction therefor, be

fined not exceeding ten dollars (Laws 1911, p. 202)."

"Sec. 5663. *Trespass—Trapping.*—It shall be unlawful for any person or persons to go upon the enclosed premises of another for the purpose of molesting the den or dens of any fur or hair-bearing animal by any human device, or to set any trap, snare, net, deadfall or other device without first having upon his person at the time the written permission of the owner or agent of such premises to so do. Any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than fifty dollars nor less than ten dollars for each offense (Laws 1913, p. 224)."

BRIEF OF THE ARGUMENT.

I.

The mollusks taken from the Little River were shell fish controlled by the same rules of law as other fishes.

Martin v. Wadell, 16 Pet. 414;
11 Ruling Case Law, p. 1015;
Moulton v. Libbey, 37 Me. 472;
Caswell v. Johnson, 58 Me. 164;
Weston v. Sampson, 8 Cushing (Mass.) 764;
First Opinion of Court of Appeals (Rec., p. 132);
Second Id. (Rec., p. 144).

II.

For plaintiff to recover in this action, his assignors must have had prior possession of, or plenary title to the mollusks or shells taken therefrom.

Northern Pacific Co. v. Lewis, 162 U. S. 373;
United States v. Loughrey, 172 U. S. 213.

III.

The plaintiff's assignors cannot maintain trespass against defendants merely because mollusks were taken by others from their premises and the shells thereof sold and shipped to defendants.

Brown v. Peaslee, 69 N. H. 458;
Neild v. Burton, 49 Mich. 53;

Talmadge v. Scudder, 2 Wright (Pa.) 517;
Catlin v. Warren, 16 Bradw (Ill. App.) 418.

IV.

The land owner has no title to the wild animals in his forest, nor to the fishes in his stream. The ownership is in the sovereign.

19 Cye 988;
McCready v. Virginia, 94 U. S. 394;
11 Ruling Case Law 105;
3 Minor Institutes, p. 12;
Farnham on Waters, Sec. 1426;
Parker v. People, 111 Ill. 603;
Peters v. State, 96 Tenn. 682;
State v. Thereault, 70 Vt. 617.

V.

A landowner takes no title to fishes or game reduced to possession by a trespass on his premises.

Geer v. Connecticutt, 161 U. S. 523;
Beach v. Morgan, 67 N. H. 529;
11 Ruling Case Law, p. 1039.

VI.

Both by the civil and common law, in the absence of inhibitory legislation, one who reduces game or

fishes *ferae naturae* to possession, acquires title, though he so reduce them on the lands of another.

Geer v. Connecticutt, 161 U. S. 523-526.

VII.

It is within the power of the state to take unto itself whatever right the landowner might otherwise assert at common law to game or fishes reduced to possession by a trespass on his premises.

Geer v. Connecticutt, *supra;*
State v. Weber, 205 Mo. 36;
State v. Heger, 194 Mo. 707;
State *ex rel.* v. Warner, 197 Mo. 650.

VIII.

Missouri has regulated the taking of fish and game for many years.

State *ex rel.* v. Warner, 197 Mo. 666.

IX.

Under the legislation in that state, title to game and fishes taken in trespass vests, not in the proprietor of the premises, but in the state.

Mo. Laws 1905, p. 139, reinacted as Laws 1909, p. 159, and now to be found as R. S. Mo. 1919, Sec. 5581.

X.

Title to the beds of public navigable streams in Missouri is in the sovereign.

Benson v. Morrow, 61 Mo. 345;
State *ex rel.* v. Longfellow, 169 Mo. 109;
McKinney v. Northcutt, 114 Mo. App. 146.

XI.

Title to smaller streams (such as the Little River) is in the riparian proprietor subject to the public right of user.

Mo. Constitution 1875, Art. I, Sec. 1;
McKinney v. Northcutt, 114 Mo. App. 146;
Weller v. Mining Co., 176 Mo. App. 243;
Stewart v. Clark, 58 Amn. Dec. (Tenn.) 49;
Gaston v. Mace, 5 L. R. A. (W. Va.) 396;
Webster v. Harris, 59 L. R. A. (Tenn.) 394.

XII.

The public right of user includes the public right of fishery.

Willow River Club v. Wade, 42 L. R. A. (Wis.) 305;
Lincoln v. Davis, 53 Mich. 375.

XIII.

The custom of the particular community makes it so.

Strother v. Lucas, 12 Peters 445.

XIV.

The facts show an implied license in the community to do on the premises what defendant's vendors did, valid until revoked by fair notice to desist.

Marsh v. Colby, 39 Mich. 626;
Knowles v. Dow, 22 N. H. 387;
Driscoll v. Lime & Cement Co., 37 N. Y. 637;
Stevens v. Howerton, 49 Ind. App. 151;
Noftager v. Barkdall, 148 Ind. 531;
Thayer v. Jarnes, 44 Wis. 388.

I.

Mussels Generically Considered.

The things which were taken from Little River, of which the plaintiff complains, were *live* mussels, pursuing their lives on the bed of the stream. A mussel is a species of shell-fish, encased, like an oyster or a clam, in a shell. The evidence shows that they move from place to place, either by propelling themselves slowly along the bed of the stream, or by at times rising near the surface of the water and floating with its current. Those in controversy here were neither artificially propagated, nor in anywise "cabinned or confined."

The authorities unanimously agree that shell-fish, which lie upon the bottom of the stream, are of the same *genera*, and subject to the same rules of law, as the fishes which swim its waters. Thus, in 11 R. C. L., at page 1015, it is said:

> "*The term 'fish' is construed to include the different kinds of shell-fish*, such as oysters, clams and lobsters."

On the same principle in Moulton v. Libbey, 37 Me. 472, the Supreme Judicial Court of Maine held that a right of fishery included the right to take shell-fish.

We quote these remarks of Chief Justice Shepley in that case on this question:

> "If this be so, his counsel insists that the common right of fishery does not include the fishery of clams, which are taken out of the soil. In all the treatises respecting that common right the general term '*piscaria*', or its equivalent, is used as including all fisheries, without any regard to their distinctive character, or to the method of taking the fish. There are many kinds of fishery recognized in them and in judicial decisions; but the general term is uniformly used, not with reference to any one of them, unless that one be particularly named, but as including them all. * * *
>
> The case of Seymour v. Courtenay, 5 Burr. 2814, appears to have been referred to by Mr. Justice Thompson, in his opinion in the case of Martin v. Waddell, as unfavorable to such a conclusion.
>
> The action was trespass for disturbing the plaintiff's several fishery, claimed by a grant from Lord Clifford, with the exception of an oystery, and a reservation of a right to take fish for his own table. The question was whether the exception and reservation destroyed the several fishery. Lord Mansfield, as reported, says: 'Here Lord Clifford, being the general owner, demised to the plaintiffs, reserving a particular species of fishery, viz, the oystery, which in its nature is to be exercised in a particular mode.' An oystery is here regarded as a 'particular species of fishing', and of course included in the common right of fishery. The case, so far as it

has any bearing on the present question, is clearly favorable to the common right, and not opposed to it. For oysters, as well as clams, are often taken out of the soil by digging.

Mr. Justice Thompson referred also to the case of Rogers v. Allen, 1 Camp 308, for the same purpose. That was an action of trespass for breaking and entering the several oyster fishery of the plaintiff. The special plea of the defendant alleged that the *locus* was in a navigable river and arm of the sea; that all the king's subjects had a right there to fish and dredge for oysters. The plaintiffs did not deny that common right, but in their replication prescribed for a several fishery as appurtenant to the manor of Burnham, and attempted to prove it as existing 'in very early times.' The defendants attempted to disprove the existence of a several fishery, by showing that all persons who chose had been accustomed to fish there for all sorts of floating fish. In reply to this, among other remarks, Mr. Justice Heath said: 'Part of a fishery may be abandoned and another part of more value may be preserved. In the whole case *the fishery for oysters is treated as included and as governed by the laws respecting the common right of fishing*, unless withdrawn by a prescription for a several fishery, which may as well be applied to a salmon as to an oyster fishery. The case is therefore favorable to the common right as including shell-fish.'

No case has been cited or noticed in the English books in which shell-fish have not been regarded

as included in the communis piscaria of the kingdom. They are so regarded and spoken of in the opinion of the Court in the case of Martin v. Waddell.

In the case of Weston v. Sampson, the question whether shell-fish, including clams, constituted a part of the common fisheries was very fully considered, and the decision was that they did."

In Caswell v. Johnson, 58 Me. 164, it was held that a contract not to engage in the sale of "*fish*" in a certain market inhibited the sale of *shell-fish.*

In Weston v. Sampson, 8 Cush. 764, the Supreme Judicial Court of Massachusetts announced the same conclusion respecting shell-fish in the following language:

"This common and general right of fishing in the sea and on its shores, at common law, being established, we think it is equally well determined by the authorities that this right extended to shell-fish, as well those which are embedded in the soil as those which lie on the surface (Bagott v. Orr, 2 Bos. & Pul. 472; Martin v. Wadell, 16 Pet. 414; Peck v. Lockwood, 5 Day. 22)."

The case of Martin v. Wadell, 16 Pet. 414, referred to by the Massachusetts court in the preceding quotation, involved a discussion of the right of fishery for shell-fish. The entire opinion of Mr. Chief Justice

Taney, who wrote the opinion of the Court in the case, proceeds upon the fundamental basis that the right to "*shell-fish*" and "*floating fish*" rests upon precisely the same legal foundation.

The Court of Appeals concurred in these views in each of the opinions filed in the present controversy. In the first Mr. Circuit Judge Carland, speaking for the Court, said (Rec., pp. 132-133):

> "The elementary authorities in our judgment sustain the views above expressed and seem to be in line with the statute of the State of Missouri in regard to the public waters of said state. The term 'fish' includes the different kinds of shell fish such as oysters, clams and lobster. Moulton v. Libbey, 37 Me. 472; Caswell v. Johnson, 58 Me. 164. Note: 60 L. R. A. 516, 11 R. C. L. 1015. Fish, generically speaking, on account of their migratory character and want of a fixed habit are classified as animals ferae naturae. Their ownership while they are in a state of freedom is in the state, not as a proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common, and the ownership thereof may not be claimed by any particular individuals. 11 R. C. L. 1015-1016; State v. Heger, 194 Mo. 711; State v. Weber, 205 Mo. 36.
>
> The difference in the locomotive powers of swimming fish and shell fish, however, justifies a distinction as to their ownership. In their natural state shell fish, like swimming fish, are

classified as ferae naturae and their ownership is vested in the state in its sovereign capacity. 19 Cyc 988-B; R. C. L. 1017. Oysters and clams, however, which are planted where they do not naturally grow and the location of which is marked by posts or otherwise, are the subjects of private ownership. R. C. L. 1018. In Parker v. The People, 111 Ill. 588, the Supreme Court of Illinois said:

'From the wild and wandering nature of fish they are not, nor can they be, the subject of ownership in running streams, like animals and fowls which have been domesticated. The nature of fish impels them periodically to pass up and down streams for breeding purposes, and in such streams no one, not even the owner of the soil over which the stream runs, owns the fish therein, or has the legal right to obstruct their passage up or down, for to do so would be to appropriate what belongs to all to his own individual use, which would be contrary to common right, and all having a common and equal ownership, nothing short of legislative power can regulate and control the enjoyment of this common ownership.'

In Peters v. State, 96 Tenn. 682, the Supreme Court said:

'Fish in streams or bodies of water have always been classed by the common law as ferae naturae, in which the riparian proprietor or the owner of the soil covered by the water, even though he may have the sole and exclusive right of fishing in said waters, has at best but a quali-

field property, which can be rendered absolute only by their actual capture, and which is wholly divested the moment the fish escape to other waters.'

The above language of the Supreme Court of Tennessee was fully approved in State v. Theriault, 70 Vermont 617."

In the second opinion, Mr. District Judge Van Valkenburgh said (Rec., p. 144):

"We adhere to the conclusion originally reached that the fresh water mussel is a shellfish capable of locomotion, in a most limited degree to be sure, but sufficient to bring it within the category of migratory fish."

It, therefore, seems reasonably certain that mussels in a flowing stream, not artificially propagated or enclosed, are to be classed and dealt with as fish *ferae naturae;* and that the title of plaintiff's assignors to the shells here in controversy is to be disposed of on that hypothesis.

II.

Title to Fishes Ferae Naturae.

The plaintiff's assignors were the owners of lands through which flows Little River. It may be assumed for the purposes of the present argument that their title included the bed of the stream, as it is

not of sufficient size or importance to justify the conclusion that its bed belongs to the public. On that premise, what title had they to the fishes, shell or otherwise, living in the waters thereof?

It must be remembered that, while the petition was framed in this case to charge that the defendants, through agents, entered upon the lands of the plaintiff's assignors and removed these mussels, the evidence proved no such case. One Blake gathered mussels out of the stream and purchased other mussels from other diggers. These were cooked upon the bank so as to remove the mussels from the shells, and the latter were loaded into cars and shipped to the defendants in ordinary course of business at Muscatine, Iowa, and paid for by the defendants without notice of any infirmity in the title of their vendor. Although declaring in the petition for an unlawful entry upon their lands, when the case reached its pith in the trial court counsel for the plaintiff were driven to the assertion that what they claimed to recover was the value of these shells, and that only (Rec., p. 121). There can be no recovery here unless it can be said that plaintiff's assignors had title to these shells at the time the defendants received and paid for them, because no trespass by the defendants, or under their authority or direction was proven. The question therefore, at this point is: What right or title has the riparian proprie-

tor to fishes taken without his consent from the stream which flows through his premises, and removed from the premises and sold by a stranger? This is true, because it is manifest that whatever remedy the plaintiff's assignors might have had against those who committed a trespass upon their premises, if one were committed, their right to recover against these defendants must rest upon a plenary title to the shells themselves.

In Northern Pacific Company v. Lewis, 162 U. S. 373, Mr. Justice Peckham, writing the opinion of the court, pointed out that in an action in trover for the conversion of chattels, the plaintiff must show either prior possession or a plenary title, good against the world, in himself. To the same effect are the remarks of Mr. Justice Brown, speaking for the court, in United States v. Loughrey, 172 U. S. 213.

The plaintiff in this case, nor his assignors, had ever any sort of possession of the shells in controversy, nor yet of the mollusks from which they were taken. The plaintiff, therefore, under the authority of the cases referred to, must show a plenary title thereto in his assignors, good against the world, or this action must fail.

Assuming, for the moment, that Little River is entirely private property, and that the public have no right to resort thereto, then what is the title of plaintiff's assignors to these shells? This inquiry

must be considered independent of legislation in the state, as well as in the light of the state statute quoted hereinbefore.

We think the current of authority is uniform in this country that the landowner has no title to the wild animals which roam his forest, or to the fishes which dwell in his stream, even though members of the community may have no right to resort to his premises in order to take them.

In 19 Cyc 988, it is said:

> "Fish and game being wild animals, their ownership, so far as they are capable of ownership, is in the state for the benefit of all its people in common, and a private person can not acquire an exclusive property therein except by taking and reducing them to actual possession, or by a grant from the government. Property in fish, as well swimming as *shell-fish*, is in the public, until they are taken and reduced to actual possession, in which case absolute property is acquired by the individual so taking them and continues as long as he retains such possession, but subject to be divested if the fish escape or are returned to other waters."

In McCready v. Virginia, 94 U. S., l. c. 394, Mr. Chief Justice Waite, writing the opinion of the Court, after having referred to the title which the state

owns to tidewaters, said this respecting the fishes which swim therein:

> "In like manner, the states own the tide-waters *themselves, and the fish in them, so far as they are capable of ownership while running.* For this purpose the state represents its people, and the ownership is that of the people in their united sovereignty."

In 11 R. C. L., at page 1015, the rule respecting the property in fishes is thus declared:

> "Fish are classified in the law, largely perhaps because of their migratory characteristics and want of a fixed habitat, as animals *ferae naturae. Their ownership, while they are in a state of freedom, is in the state,* not as a proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common; *in other words, the right of property in fish, so far as can be asserted before they are taken and reduced to possession, is common to all the people and cannot be claimed by any particular individuals.*"

In 3 Minor's Institutes, p. 12, the author says:

> "A free fishery is an exclusive right of fishing in a public river, and is also a royal franchise, which it has not been lawful for the crown to grant since Magna Charta (A. D. 1215). So that a free fishery at the present day, in order to

be valid, must be derived from a grant, actual or presumed, antecedent to that date (2 Bl. Com. 39 *et seq.*; 2 Steph. Com. 22-'3).

All these franchises being in the nature of monopolies, and in derogation of the natural rights of the citizen, are to be construed strictly and by no means to be carried beyond their plain intent."

In Farnham on Waters, Sec. 1426, it is said that the proprietor of even a private fishery does not own the fish therein if the same be connected with waters flowing through the property of others; and that his only right to the fish in his own waters is the right of capture in season.

In Parker v. The People, 111 Ill. 603, the Supreme Court of Illinois said with respect to the title of the riparian owner to fish in a stream, this:

"From the wild and wandering nature of fish they are not, nor can they be, the subjects of ownership in running streams, like animals and fowls which have been domesticated. The nature of fish impels them periodically to pass up and down streams for breeding purposes, and in such streams no one, not even the owner of the soil over which the stream runs, owns the fish therein, or has the legal right to obstruct their passage up or down, for to do so would be to appropriate what belongs to all to his own individual use, which would be contrary to common right, and all

> having a common and equal ownership, nothing short of legislative power can regulate and control the enjoyment of this common ownership."

In Peters v. State, 96 Tenn. 682, the Supreme Court of Tennessee said on this subject, this:

> "Fish in streams or bodies of water have always been classed by the common law as *ferae naturae*, in which the riparian proprietor or owner of the soil covered by the water, even though he may have the sole and exclusive right of fishing in said waters, has, at best, but a qualified property, which can be rendered absolute only by their actual capture, and which is wholly divested the moment the fish escape to other waters."

In State v. Theriault, 70 Vermont 617, this ruling of the Supreme Court of Tennessee was quoted by the Vermont court with the fullest approval.

Such is the limited nature of the right of the riparian proprietor to fishes inhabiting his stream, even though this be a private stream to which no member of the community has any right to resort without his consent. And such at best were the rights of plaintiff's assignors, assuming the Little River to have been purely and only private property and subject to no sort of user by the community. In such case the landowner may sue in trespass those who enter his premises and reduce wild game or

fishes to possession thereon; but he cannot sue in trover a remote transferree thereof for the manifest reason that he cannot show either private possession or a prior title in himself. He cannot sue defendants for a trespass which, if committed, was the act of their vendors and not of themselves.

In Brown v. Peaslee, 69 N. H. 458, the action was trespass q. c. f. It appeared that the defendant had purchased wood from one Mitchell, who yarded the same on the plaintiff's premises preparatory to loading. This was held to be Mitchell's trespass and not that of the defendant. Chase, J., writing the opinion of the Court, said:

> "Mitchell, in using the plaintiff's land, was not acting as a servant or agent of the defendant, but was acting independently. If the defendant is responsible for the acts, it is because of his advancements to Mitchell after he learned that the wood was on the plaintiff's land, or because of his reply to the sheriff's inquiry about the ownership of the wood. The payments furnish no ground for such responsibility."
>
> * * * * * * *
>
> "The wood was composed of inert objects, which would not have been upon the plaintiff's land unless placed there by some one. The trespass arose from the acts of placing it there, and not from its ownership. Unless the defendant directed or authorized these acts he was not the trespasser."

To the same effect is the opinion of Campbell, J., speaking for the Michigan Court in Nield v. Burton, 49 Mich. 53, where a trespasser had removed timber from the plaintiff's premises and sold the same to the defendant, and where this was said:

> "If they were joint wrongdoers with Cameron this question would be presented and might deserve attention. But they were not. They agreed to purchase timber, but they never authorized it to be cut from lands where the cutting would be wrongful. The testimony is clearly the other way, and no attempt was made to hold them on any such theory. They could not become wrongdoers until some act was done by themselves or by their agents, authorized or ratified. Cameron was not their agent. They asserted no control over the timber personally until it was actually delivered to and accepted by them."

Of like effect are Talmadge v. Scudder, 2 Wright (Pa.) 517, and Catlin v. Warren, 16 Bradw (Ill. App.) 418.

In other words plaintiff's assignors have no right of action against defendants for a trespass on their premises because, forsooth, Blake and his associates entered thereon and took therefrom something which they sold to the defendants. On such facts the action against the defendants is for that which they thus received, to successfully maintain which plaintiff must show plenary title thereto in his assignors,

inasmuch as there is no pretense that they had ever had possession of either the shells or mollusks from which they were taken.

The Court of Appeals in its last opinion held that upon the reduction to possession of fishes or animals *ferae naturae* by trespass on the land of another the title thereto vests, not in him who thus acquires possession, but in the owner of the premises upon which the fishes or animals chanced to be when reduced to possession. There may be found utterances, mostly *dicta*, to that, effect, but they are believed to be unsound. Animals *ferae naturae* (absent regulatory statutes) are segregated from the common ownership by the act of reduction to the possession of an individual number of the community, and it is believed that the law looks only to the fact of possession, without taking note of the conditions or circumstances under which the reduction occurred. The landowner is, of course, not without his remedy—he may prevent or recover for an invasion of his premises; but he cannot claim title to that to which title is only acquired by actual seizure. Such is the doctrine announced in Geer v. Connecticut, 161 U. S. 523, 526, where the whole subject of acquiring title to animals *ferae naturae* was examined in its fundamentals, under the civil, as well as the common law. These luminous remarks of the late Mr. Chief Justice White, speaking for the Court, on

that occasion seem to dispose of the question, (161 U. S. 523).

> "Among other subdivisions, things were classified by the Roman Law into public and common. The latter embraced animals *ferae naturae*, which, having no owner, were considered as belonging in common to all the citizens of the state. After pointing out the foregoing subdivision, the Digest says:
>
> 'There are things which we acquire the dominion of, as by the law of nature, which the light of natural reason causes every man to see, and others we acquire by the civil law, that is to say, by methods which belong to the government. As the law of nature is more ancient, because it took birth with the human race, it is proper to speak first of the latter. 1. Thus, all the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them. * * * Because that which belongs to nobody is acquired by the natural law by the person who first possesses it. *We do not distinguish the acquisition of these wild beasts and birds by whether one has captured them on his own property or on the property of another;* but he who wishes to enter into the property of another to hunt can be readily prevented if the owner knows his purpose to do so' (Digest, Book 41, Tit. 1, De Adquir Rer Dom).
>
> No restriction, it would hence seem, was placed by the Roman law upon the power of the individual to reduce game, of which he was the

> owner in common with other citizens, to possession, although the Institutes of Justinian recognize the right of an owner of land to forbid another from killing game on his property, as indeed this right was impliedly admitted by the Digest in the passage just cited (Institutes, Book 2, Tit. 1, s. 12)."

He found the same fundamental rules to prevail at the common law, because, in dealing therewith he says (*Id.* 526):

> "Blackstone, whilst pointing out the distinction between things private and those which are common, rests the right of an individual to reduce a part of this common property to possession, and thus acquire a qualified ownership in it, on no other or different principle from that upon which the civilians based such right."

In keeping with that doctrine, the authorities, while maintaining the right of the landowner to sue for an unauthorized entry on his premises, deny his title to game taken in the course of the trespass. Beach v. Morgan, 67 N. H. 529, was an action for entering the plaintiff's premises and taking certain fishes from a small brook thereon. The New Hampshire Court affirmed the right to recover for the entry, but denied the right to recover for the fishes taken, saying:

"The fish taken by the defendant, being *ferae naturae*, the plaintiff can recover for the trespass only."

In 11 Ruling Case Law, p. 1039, here is his statement on that subject:

"25. *Trespass As Remedy.*—If one enters the private property of another and takes fish from waters wherein the owner has an exclusive right to catch them, *he is guilty of a trespass.* Even though the fishery is owned by another than the owner of the soil, he may find a remedy in trespass, for his interest is an incorporeal hereditament which will suport such an action. *The uncaught fish in the waters belong to the people of the state*, not to the owner of the soil beneath the waters, but this circumstance does not preclude the unlawful entry from being stamped as a trespass. The *entry* constitutes a trespass *quare clausum fregit*, not a *trespass de bonis asportatis. In the action he can recover no damages for the value of the fish, but only the damages for the trespass and the injury to his fishery.* If the proprietor has given a person a license to take fish from his fishing place, an action of trespass must fail; and it is sometimes thought that a custom of the public to take fish from the water will supply an express license, in the absence of notification to the contrary."

From these considerations it results, that without reference to the state statute quoted, this action

fails for lack of title in plaintiff's assignors to the shells essential to a recovery.

In other words, and as the learned District Judge ruled in directing a verdict for the defendants, when one enters upon the premises of another and captures wild game or fishes, he has committed a trespass for which the owner may maintain trespass *quare clausum fregit*, and his damages may be enhanced by the value of the game removed, on the theory that by so removing it the trespasser has destroyed the right of the owner to reduce it to possession for his own purposes and thereby acquire title to it. But the game or fish so removed is not his own, and any action which he may bring against a stranger to the trespass which has for its basis the assertion of title in himself, must fail. In this case, according to that rule, the plaintiff's assignors might have sued those who removed these mussels from the river and recovered their value as damages for the trespass, if it be assumed that they were without right to take them; but the removal gave the landowner no title to the shells; and without title to the shells he can maintain no action against these defendants who committed no trespass on his premises, but merely purchased the shells. Such seems to be the situation, without considering state legislation.

In Gur v. Connecticut, *supra*, it became necessary for this court to examine fundamentally the rights

of the sovereign state to the wild game and fishes found within its borders. As pointed out in that opinion, in the British Isles title to all such was in the sovereign under a doctrine identical with that under the Civil law on the subject, quoted above (161 U. S. 527). It was said in that case that in this country the state, as trustee for its citizens, had succeeded to the title of the crown (Id. 529).

So absolute is the ownership of the state that it was held in that case that, notwithstanding the exclusive power of the congress to regulate commerce among the states, an individual state might nevertheless forbid the movement in interstate commerce of game taken within its boundaries. (Id. 534.)

In the light of that opinion it is manifest that the right of the landed proprietor (whatsoever its nature or extent at common law) to the game found upon his premises is subject to the superior right and title of the state. For instance, the landed proprietor enjoys no right to reduce game to his possession and enjoyment, even on his own premises, which the state may not regulate and even forbid along with similar regulations applicable to other members of the community.

The proposition may be stated more concretely. If, as held by the Court of Appeals in its last opinion, the landowner has such a title at common law to wild game upon his premises, as that he acquires

a complete title against the world when the same is reduced to possession by a trespasser, nevertheless, it is within the power of the state to take away that title in its own behalf without the infringement of any constitutional right. Not that the state may authorize a trespass or forbid a landowner's possessive action for trespass because, forsooth, the trespasser is a hunter or a fisherman. But that the state may refuse to recognize, or may deny by legislation the plenary title of the landowner to the game itself, when, and because reduced to possession by a trespasser on his premises. So much is the inevitable result of the opinion in this court in Geer v. Connecticut, *supra*.

Have the legislature of Missouri so done?

As has already been pointed out the statute to be here construed is a part of an enactment of the General Assembly of Missouri, of the year 1909 (Laws of Missouri, 1909, p. 10 *et seq*). This enactment is to be found also in the Revised Statutes of Missouri of 1919, Chapter 37, Article II, Sec. 5581 *et seq*. The first section of this statute was first enacted in the state in 1905, as a part of a statutory game and fish regulation of that year. (Laws 1905, p. 159.). In 1909 the General Assembly of the state again revised the regulations, adopting as the first section of the statute then enacted the corresponding section of the Act of 1905. The regulations prescribed by the two

acts, in other particulars, are somewhat different. The differences, however, are immaterial to the present controversy.

The state had had, for a long number of years, statutes designed to regulate the taking of wild game and fish. (Laws of 1860-1, p. 38; Laws of 1874, p. 108; Laws of 1877, p. 133; Revised States 1879, Sec. 1614, *et seq.*; Laws of 1877, p. 348; Revised Statutes 1879, Sec. 1612, *et seq.*; Revised States 1889, Sections 3899 to 3916, incl.; Revised Statutes 1909, Sec. 2305 to 2320, inclusive, and 7456 to 7565, inclusive; Laws of 1905, p. 158.)

To avoid the somewhat tedious examinations of these statutes it may be sufficient here to quote this language of the Supreme Court of that state in State *ex rel.* v. Warner, 197 Mo. 666, as giving briefly a history of the fish and game regulations in Missouri prior to the enactment of the Act of 1905, and its successor, the Act of 1909:

> "The history of our state legislation on the preservation of fish and game is somewhat curious and not without significance on the question being considered. The constitutional provision in hand was substantially borrowed from the constitution of 1865 and the plan of devoting fines, penalties and forfeitures (arising from the violation of "penal laws") to a free public school fund seems to have originated in the lat-

ter instrument. Before such constitution was adopted, the legislative mind considered fish, at least. So far as the investigation of the writer goes, statutory enactments intended to aid in the preservation of the supply of fish, appeared first in the Laws of 1860-1, p. 31. That act related to the erection of seines, nets, fishdams and other obstructions in the waters of the state in such a way as to 'obstruct the passage of fish up and down or through such waters or streams. In other words, fish, *sub modo*, were allowed by law to swim wherever whim or instinct, pleasure or business, called. Moreover, it is provided therein that any person violating the law shall be arrested on complaint and a justice was to hear the case in a 'summary manner,' and any person found guilty, for the first offense, was to be fined not less than five or more than twenty dollars; for the second offense the fine might be doubled. The act speaks of the prosecution as a 'suit' and provides that one-half the fine should go to the 'common school fund of such county' and the other half should be paid the informer. If the fine was not paid, the offender was committed to jail. This act seems to have been carried forward into the revision of 1865 and into Wagner's Statutes.

In 1874 the legislature passed an act entitled, 'An Act for the preservation of game, animals and fish' (Laws 1874, p. 108). Violations of the law were made misdemeanors and fines inflicted therefor inured to the public school fund (Sec. 7). The same legislature passed an act entitled

'An Act to prevent the destruction of fish' (p. 114). A violation of certain provisions of the last-mentioned law was made a felony to be punished by confinement in the penitentiary not exceeding three years. Violation of other provisions was made a misdemeanor, and a person convicted thereof was mulcted in a fine not exceeding $500. The legislative mind did not act upon the disposition of such fines, but they were left to take the constitutional course.

In 1877 the Fish Act of 1874 was repealed (Laws 1877, p. 330), and in lieu thereof a new law was passed making violations of its provisions misdemeanors and giving informers in case of successful prosecution and recovery of fine, one-half of the amount recovered—the remainder, presumably, to take the constitutional course. The same legislature passed a new act for the preservation of game, animals, etc., making violations thereof misdemeanors and providing that one-half of the collected fines should be paid into the public school fund of the county and the other half to the informer. These laws were carried forward into the revision of 1879, 1889, and 1899, with but small change—the disposition of fines remaining the same.

Carried forward with the act of 1877, in the aforesaid revisions, was an act passed in 1879, entitled, 'An Act for the propagation and protection of foodfishes in the waters of the State of Missouri, and to appropriate money therefor' (Laws 1879, p. 153). This latter act made sundry violations misdemeanors and provided that one-

half of the fines should be paid to the informer, the other half, presumably, to take the constitutional course (R. S. 1879, Secs. 1612-1634; R. S. 1889, Secs. 3899-3919; R. S. 1899, Secs. 2301-2320; in the last-named revision certain amendatory acts are included, but the disposition of the fines remains as in the act of 1877)."

As none of these statutes were in force when the transactions here involved were had, and as all of them were superseded by the Act of 1909, which is to be particularly dealt with here, it seems unnecessary to say more concerning them than that they were merely regulations of the privilege of taking game and fish without more, and were of the general type of those noticed in Geer v. Connecticut, as having been enacted from time to time in various states of the Union, and that none of them contained any enactment declaring or asserting title in the state.

The Act of 1905 and its successor Act of 1909, however, mark a distinct departure from all previous enactments dealing with this subject, in that the first section of each of these legislative enactments reads as follows:

"The ownership of and title to all birds, fish and game, whether resident, migratory or imported, in the State of Missouri, not now held by private ownership, legally acquired, is hereby

declared to be in the state, and no fish, birds or game shall be caught, taken or killed in any manner or at any time, or had in possession, except the person so catching, taking, killing or having in possession shall consent that the title of said birds, fish and game shall be and remain in the State of Missouri, for the purpose of regulating and controlling the use and disposition of the same after such catching, taking or killing. The catching, taking, killing or having in possession of birds, fish or game at any time, or in any manner, by any person, shall be deemed a consent of said person that the title of the state shall be and remain in the state, for the purpose of regulating the use and disposition of the same, and said possession shall be consent to such title in the state."

Shell-fish being included in the species of fish must be held to have been included within the terms of this enactment.

That it was especially designed to include such within its scope is evidenced by the terms of section 34 of the statute, which provides (Laws of 1909, p. 527, R. S. 1919, Sec. 5628):

> "It is hereby declared unlawful for any person to engage in what is commonly known as 'pearl fishing' in any of the waters of this state at any time during the months of March, April, May and June."

The mollusk of Missouri streams is, to a limited extent, pearl-bearing; and the industry known in that community and in this enactment as "pearl fishing" is the taking (and destruction) of the mussel in the hope of finding a pearl. That the statute prohibits the taking of these mollusks during the prescribed closed season from any other motive or any other purpose as well as pearl fishing is manifest.

Recurring again to the first section of the Act the inquiry is: What was the purpose of the Legislature in enacting that "the ownership and title" to all fish and game found within the limits of the state was in the sovereign (and as a necessary consequence not to any extent in the landed proprietor)? The Court of Appeals, in its initial opinion in this case, held that this language meant what it said, and of necessary consequence excluded the title of the landowner to game, in favor of the state, though reduced to possession on his premises by a trespasser; whereas, in its last opinion, that court receded from this position and held that the only purpose of this enactment was to enable the state to regulate the taking of fish and game and that it had no effect whatsoever on title. It seems to us that there is a ready answer to the suggestion of the last opinion of the Court of Appeals. The state had continuously regulated the taking of game and fish since as early as 1860, by various and sundry enactments. It had pre-

scribed closed seasons and licenses, had regulated the time and manner of taking, had prescribed bag limits, had forbade the sale of game and fish or the having it in possession in closed season, and had prescribed various and sundry regulations by various and sundry legislative enactments *without having found it necessary to legislatively assert title in order to make these regulations effective.* Having in view the history of prior legislation in the state on the subject, it is manifest that Section 1 of the Act of 1905 and of 1909 were entirely superfluous if bare regulation was the only object of the enactment.

But this section was intended for some purpose and must be given some effect. The last opinion of the Court of Appeals, in our humble opinion, gives it none.

Was it not intended to put an end among others to the right here asserted of the landed proprietor, and to take unto the state such peculiar property as the landed proprietor might have hitherto enjoyed in wild game and fishes? It will be observed that, under the terms of the section, even after game and fish have been reduced to possession, they are still made to remain the property of the state and the possessor is, in effect, a mere tenant at sufferance.

The section cannot be given effect as written, and at the same time the right of the landowner to game

taken in trespass on his premises be given recognition. Absolute title cannot be in the state in game and fishes wrongfully taken, as this statute declares, and at the same time the same absolute title be in the owner of the premises upon which they were wrongfully taken. From which it seems to us to result that, while the landowner has his remedy for trespass on his premises, of which the lawmakers in Missouri have made no attempt to deprive him, the title to game or fishes, taken by means of such a trespass, is not now in him, but in the state. And this is true, by force of the statute, assuming that the Court of Appeals is correct in the view that, without the statute, the rule would be otherwise.

It is to be regretted that there is no definite utterance of the Missouri court respecting the proper interpretation of this enactment. That court has had occasion to go no further than to affirm, as this Court affirmed in Geer v. Connecticut, the unlimited powers of the state in the premises (State v. Weber, 205 Missouri, 36: State v. Heger, 194 Mo. 707; State ex rel. v. Warner, 197 Mo. 650). As will be there seen the Missouri court rested in no small measure upon the utterances of the Court in Geer v. Connecticut as authority for the position taken.

These adjudications of the Missouri court have dealt only with the constitutionality of various regulatory enactments. The fundamental question here

dealt with, arising under the first section of the existing statute, has not engaged the attention of that court. It, however, as has been suggested, is a part of the law of the state and must be given effect. It has not, in our humble opinion, been given any effect at all by the last opinion of the Court of Appeals in this cause. Giving it effect, it results that even conceding the Court of Appeals to be correct in its statement of the common-law right of the landowner as to game taken by a trespasser on his premises, nevertheless that common-law right did not survive this enactment. Under the plain provisions thereof, game taken wrongfully, or in violation of law, remains, after the taking, as it was before, the property of the state. And as this action is predicated on the title of plaintiff's assignors to the mussels before they were taken and to the shells from the mussels after they were taken, it must fail.

III.

The Right of Fishery.

We have hitherto considered this case from the viewpoint that the Little River was private property, and that the community have no rights therein or of resort thereto.

It is our insistence, however, that the stream is one of the "public waters of the state" under the rules of law prevailing in Missouri.

As is well understood, under the law of England those waters in which the tides ebb and flow are public property, while those not subject to the action of the tides are private property. The jurisprudence of the United States, particularly the Western and Southern states, presents a wide departure on this subject from the common law as understood and administered in the mother country. The theory that those only are public waters where the tides ebb and flow was doubtless entirely suited to the physical characteristics of England—and, indeed, no doubt grew out of that situation. As has been often remarked by courts and authors dealing with this subject, there is no stream in that country of any particular importance which is not subject to the action of the tides. But that is not true with us. And in consequence the courts generally in this country have adopted the rule of the civil law to the effect that the title to public waters is in the state, while the title to the bed of streams only capable of a limited use is in the riparian proprietor *subject to the public right of user*. The extent to which this rule has been adopted may be well understood by an examination of Stewart v. Clark, 58 Am. Dec. 49, a decision of the Supreme Court of Tennessee: Gaston v. Mace, 5 L. R. A. 396, a decision of the Supreme Court of Errors and Appeals of West Virginia, and Webster v. Harris, 59 L. R. A. 324, a later decision of the Supreme Court

of Tennessee, in each of which the authorities so declaring are extensively considered. The doctrine enunciated by these authorities is that, if the stream be navigable by sea-going vessels or vessels built after the manner of sea-going vessels it is a public navigable stream, and the title to the bed is in the public; but if it is only capable of a more limited use, such as for rafts, logs or small boats, it is navigable in fact, and, while the riparian owner holds title to the bed, he has not title to the stream itself, other than the right to use the waters and the stream for such purposes as will not interfere with the right of the public to make such use thereof as its nature and peculiarities will permit. These views are particularly well expressed by the Supreme Court of Appeals of West Virginia in Gaston v. Mace, 5 L. R. A., at page 396.

In that case the West Virginia court, after having reviewed the state of the decisions, summed up the result in the following language:

> "In the United States there are three classes of navigable streams: (1) tidal streams that are held navigable in law whether navigable in fact or not; (2) those that, although non-tidal, are yet navigable in fact for boats or lighters, and susceptible for valuable use for commercial purposes; (3) those streams which, though not navigable for boats or lighters, are *floatable* or

capable of valuable use in bearing logs, or the products of mines, forests and tillage of the country they traverse, to mills or markets.

"With reference to the first of these classes, tidal streams, wherever the common law prevails, are held to be navigable. By the old English cases it is decided that all tidal waters are navigable to the extent of the flow and reflow of the tide; and that the absolute property interest is the same in the course, and the right of soil of owners of such land bounded by such tidewater streams, extends only to a high water mark. But above the line where the tide ceases to have any effect the rule of property is reversed and the property in the soil or bed of the river is in the riparian proprietors; and this is true also of all streams, not tidal, that are not legally navigable (see Elder v. Burrus, 6 Humph. 358, 366; Stuart v. Clark, 2 Swan. 9, 58 Am. Dec. 49).

"In the latter case McKinney, J., in delivering the opinion of the court, 58 Am. Dec. pp. 50 and 51, says that the 'rule of the common law as to what is a navigable river, namely the flow and reflow of the tide, was declared by this court in Elder v. Burrus, 6 Humph. 358, 366, to be inapplicable in this state and such has been the course of decisions in some of the American courts.

"This criterion, as applied to England, may be appropriate and practical, because, perhaps, it embraces pretty much the entire extent of all rivers which, in point of fact, are navigable; but it would be most absurd in its application

to our large fresh water rivers, which, though not subject to the influence of the tide, are fitted by nature, in their ordinary state, for all the common purposes of navigation. According to the civil law, 'navigable rivers are not merely rivers, on which the tide flows and reflows, but rivers capable of being navigated; that is, navigable in the common sense of the term' " (see Angell, Watercourses, Sec. 550).

"With reference to the second of these classes of navigable streams: It will be observed from its definition that whether fresh water streams be or be not navigable is a question of fact, and as such those who claim such non-tidal streams to be navigable have on them the burden of proving that such streams are in fact navigable for boats or lighters, and susceptible for valuable use for commercial purposes in the nature state, unaided by artificial means or devices. The stream, too, to belong to this second class of navigable streams, must be thus capable of being navigated, not at all times, but for such length of time during the year as will make such stream valuable to the public as a public highway. But the fact that the stream cannot be so used at certain seasons of the year will not destroy the public right of navigation or make such stream non-navigable (see McManus v. Carmichael, 3 Iowa 1; Rhodes v. Otis, 33 Ala. 578; Morgan v. King, 35 N. Y. 459; Berry v. Carle, 3 Me. 269; Wadsworth v. Smith, 11 Me. 278; People v. Tibbetts, 19 N. Y. 523; Reynolds v. McArthur, 27 U. S. 2 Pet. 417 [7 L. Ed. 470]; Wood, Nuis. Sec. 587).

"The very definition of the third class of navigable streams shows that these streams would not be included in the common law definition of a navigable stream—that is, one in which the tide ebbs and flows—nor could it come within the civil law definition of a navigable stream, which is capable of being navigated by boats or lighters, and on which commerce may be carried on.

"The third class of navigable streams are generally floatable streams: and though the public has a right to use them as a public highway by floating logs and other products of forest, mines and tillage down these streams to mills and market, yet the riparian owners along such streams own the bed of them as well as their banks, differing in this respect from other navigable streams."

The Constitution of the State of Missouri seems fairly to bring that state within this rule, independent of the course of its decisions; for it is provided (Missouri Constitution, 1875, Article I, Section 1) that the navigable rivers and waters leading to the Mississippi shall be *public highways*. The Act of Congress for the government of the territory and the later Act for the admission of the state into the Union carry the same reservation. The decisions of the state bring the rule of that jurisdiction well within the doctrine enunciated by the cases just referred to.

Thus it is held that the large rivers of the state capable of complete navigation in the fullest sense of the term are public waters and the title to the beds thereof is in the public.

McKinney v. Northcutt, 114 Mo. App. 146;
Benson v. Morrow, 61 Mo. 345;
State *ex rel.* Citizens Electric Light and Power Co. v. Longfellow, 169 Mo. 109.

On the other hand, the adjudications in the state recognize the public right in streams of a more limited navigability. Thus, in McKinney v. Northcutt, 114 Mo. App. 146, are these apposite and interesting observations on this question:

> "In this country, the capability of use by the public for the purposes of the transportation of commerce rather than the extent and manner of that use, affords the true criteron of the navigability of waters. If they are capable in their natural state, of being used for the purpose of commerce, no matter in which mode the commerce may be conducted, they are navigable in fact, and become, in law, public highways. * * *
>
> "Waters which can be made floatable only by artificial means are not regarded as public highways. Nor is it necessary to constitute a stream navigable for floating and rafting within the law that they should be capable of continuous use during the whole year for that purpose. It is sufficient to render a stream navigable within

the sense under contemplation, if, as a result of natural causes, it be capable of floating or other navigation periodically during the year, and so continue long enough at each period to render it susceptible to beneficial use by the public (21 Amer. & Eng. Ency. of Law [2 Ed.], 428-429)."

After quoting from Judge Cooley, Gould and Farnham on Waters, the Court says:

"So we find that by concurrence of authorities, a stream capable of transporting rafts of railroad ties, as in this case, for several months during the spring of the year, without the aid of men on the banks thereof, is navigable within the meaning of the law for that purpose and subject to the use of the public therefor, and the rights of the riparian owners to the soil adjacent to and underlying the bed of such stream are subject to this right or easement in the public which rests upon the necessities of commerce; and where, as in the case at bar, it appears that there was no other practical route by which the ties could be transported to market, the adjacent owners would have no right to interfere with one using the stream for the commercial purposes indicated. Respondent had a right to occupy the stream in floating his ties to market without inflicting injury upon the adjacent property, and the appellants had no right to obstruct said stream as shown in the evidence, or otherwise interfere with respondent in the exercise of his privilege. The views herein expressed are abundantly supported by the courts

in this country as will appear by reference to the following cases: Brown v. Chadbourne, 31 Me. 9; Bucki v. Cone, 6 South. Rep. (Fla.) 160; TenEyck v. Town of Warwick *et al.*, 75 Hun. 562; Webster *et al.* v. Harris, 59 L. R. A. (Tenn.) 324; Lewis v. Coffee County, 77 Ala. 190; Little Rock etc. Ry. Co. v. Brooks *et al.*, 39 Ark. 403; Sullivan v. Spotswood, 2 South. Rep. (Ala.) 716; Hickok *et al.* v. Hine, 23 Ohio 523; Commissioners of Burke County v. Catawba Lumber Co., 21 S. E. (N. C.) 941; State v. Baum, 128 N. C. 600; Heyward v. Farmers Mining Co. *et al.*, 19 S. E. (S. C.) 28, L. R. A. 42; Moore v. Sanbourne, 2 Mich. 519; Lamprey v. State of Miss., 18 L. R. A. (Minn.) 670."

And in the later case of Weller v. Missouri Lumber and Mining Co., 176 Mo. App. 243, are these observations respecting the subject matter:

"The Constitution of Missouri, Article 1, Section 1, reserves to the people the free use of all navigable streams leading to the Mississippi River as common highways. The law of this state, following the general trend of authority in this country, is that a stream capable of transporting commerce in any manner in which such commerce is ordinarily conducted is a navigable or floatable stream and is a public highway. In any given case, the question as to whether the stream has such capacity is one of fact for the jury to determine. The law on this subject was well declared by Nortoni, J., in the

case of McKinney v. Northcutt, 114 Mo. App. 146, 89 S. W. 351."

Within this classification Little River undoubtedly comes. It is not a navigable stream in the sense of the common law, as administered on the other side of the water, but under the local law it is a public navigable stream in the sense that the public have the right to resort to it for any use of which it is capable, albeit the bed of the stream probably belongs to the riparian proprietor.

And included in that use is the public right of fishery. There can be no question but that public navigation and public fishery go hand in hand. The common law of England has always so recognized. Whatsoever under the law of that realm constituted public waters was subject to the public right of fishery. And since under the local law, Little River is undoubtedly navigable so as to subject the same to the public right of user, there seems no reason for the contention that it is not subject to the concomitant public right of fishery.

This exact doctrine has had consideration in two cases determined by the Supreme Courts of Wisconsin and Michigan.

One of these cases is Willow River Club v. Wade, 42 L. R. A. 305. In that case the plaintiff was the owner of lands through which ran Willow River, a

small, shallow stream only capable of use for rafting, or driving logs, or for navigation in rowboats. The defendant had entered this stream from a highway and traversed it through the plaintiff's land, and caught and carried away certain fishes therefrom. The plaintiff sued him in trespass, claiming the value of the fish. The Wisconsin Court held that the stream was navigable in fact, and therefore subject to the public right of fishery, and denied recovery.

We quote these excerpts from the opinion (loc. cit. 312-313):

> "The precise question presented by the facts stated is whether the defendant, by stepping from a public highway into a boat upon the river, and while floating thereon, catching the fish in question from the river by hook and line, committed a trespass upon the premises of the plaintiff. The proper solution of the question depends upon the proper determination of one or more other questions discussed at bar. Counsel for the plaintiff is undoubtedly correct in claiming that at common law the public right of fishery in rivers was confined to such portions of the rivers as were covered by the ebb and flow of the sea, and that the right of fishing in fresh water rivers was exclusively in the abutting landowners."

After referring to the English rule respecting the

title to the bed of streams, the opinion proceeds (loc. cit. 314-322):

> "This court has held from the beginning that the owners of the bank of a navigable stream by purchase from the United States, even when meandered, were presumed to be such owners to the middle of the stream in front of such purchase (*Jones v. Pettibone*, 2 Wis. 308; *Walker v. Shepardson*, 2 Wis. 384, 60 Am. Dec. 423, 4 Wis. 486, 65 Am. Dec. 324; *Mariner v. Schulte*, 13 Wis. 692; *Arnold v. Elmore*, 16 Wis. 509; *Wisconsin River Improve. Co. v. Lyons*, 30 Wis. 61; *Wright v. Day*, 33 Wis. 260; *Olson v. Merrill*, 42 Wis. 203; *Norcross v. Griffiths*, 65 Wis. 599, 56 Am. Rep. 642; *Janesville v. Carpenter*, 77 Wis. 288, 8 L. R. A. 808). Of course, such owners take and hold such title for the use of the public.
>
> * * * * * * *
>
> But the mere fact that the title to the bed of the stream is in the plaintiff is not necessarily conclusive that the plaintiff has title to the fish in the river. As indicated, at common law the public right of fishing in rivers was confined to such portions of the rivers as were covered by the ebb and flow of the sea. The reason why the public right terminated, and the private rights begun, just where the waters of the river ceased to be impregnated with salt and were entirely fresh, might be difficult to explain, were it not for the fact that the admiralty jurisdiction of the English courts over such rivers was also limited to such tidal waters.
>
> * * * * * * *

It is true the Willow River was not meandered, and the question recurs whether, from the undisputed evidence, we can say that it was a navigable stream within the principles of law mentioned, and especially the decisions of this court. It has frequently been held that the rivers of this state, capable of floating the products of the country—such as logs and rafts of lumber—to mill or market, are common public highways (*Whisler v. Wilkinson*, 22 Wis. 576). That rule was applied to the Kickapoo River, which was not meandered (*Ibid.*). The same rule was applied to the Yellow River, which was not meandered (*Sellers v. Union Lumbering Co.*, 39 Wis. 525). The same rule was applied to Levis Creek, an unmeandered stream (*Olson v. Merrill*, 42 Wis. 203). In that case it was held, in addition, that it is not 'essential to the public easement that the capacity * * * be continuous at all seasons of the year, but it is sufficient that the stream have periods of navigable capacity ordinarily recurring from year to year, and continuing long enough to make it useful as a highway.'" (This, be it noted, is exactly the rule respecting navigability in Missouri, as in most states of the Middle West.)

"The question recurs whether the public right of fishery is included in, or an incident of, such public right of navigation. In other words, has the plaintiff, as riparian owner, the exclusive right to take fish from the river? The plaintiff certainly has no property in the particles of water flowing in the stream, any more than it

has in the air that floats over its land. Its rights in that respect are confined to their use and in preserving their purity while passing (*Lawson v. Mowry*, 52 Wis. 234, 235). *So, the fish in the stream were not the property of the plaintiff at common law, any more than the birds that flew over its land* (*State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199; Angell Watercourses, 7th Ed., Sec. 65a, and cases there cited; *State v. Welch*, 66 N. H. 178). As indicated, the public right of fishery in tidal rivers was maintained, at common law, in England, before the use of steam—when vessels could only be carried up the river by the flow of the sea and down the river by the ebb of the sea—and consequently when the ebb and flow of the tide practically measured the navigability of the stream. For the same reason the public should have the right to fish in all the public navigable waters of the state, including all public navigable rivers and streams of the state. The Supreme Court of the United States, in a recent case, partially adopting the language of the New Hampshire case cited, has declared that 'at common law, the right of fishing in navigable waters was common to all. The taking and selling of certain kinds of fish and game at certain seasons of the year tended to the destruction of the privilege or right by the destruction consequent upon the unrestrained exercise of the right. This is regarded as injurious to the community, and therefore, it is within the authority of the legislature to impose restriction and limitation upon the time and manner of tak-

ing fish and game considered valuable as articles of food or merchandise. For this purpose fish and game laws are enacted. The power to enact such laws has long been exercised, and so beneficially for the public that it ought not now to be called into question' (*Lawton v. Steele*, 152 U. S. 138, 139, 38 L. Ed. 389). In this state the *legislature has expressly declared that 'all fish in the public waters of the State of Wisconsin are hereby declared to be the property of the State*, and may be taken for the use of the individual and become his property at any time and in any manner not prohibited by the laws of this state' (Laws 1893, Chap. 307, Sec. 20). *Public* navigable streams are certainly '*public waters*,' *within the meaning of that act. Since the defendant kept within the banks of the river—within the limits of the public highway—his fishing was nothing more than the exercise of a right common to the public.* We must hold that the Willow River was a public navigable stream, and the defendant was not guilty of trespass by going upon it, as he did, catching the fish in question."

To the same effect precisely is the decision of the Supreme Court of Michigan in Lincoln v. Davis, 53 Mich. 375. Camplin, J., writing the opinion of the Court, said:

"Such fishing as is done with lines from boats, even in narrow streams, cannot be complained of by riparian owners. The fishes are, like any other animals, *ferae naturae*, and in this region

> have always been regarded as open to capture by those who have a right to be where they are captured."

In other words, according to the rule declared in these cases, if the stream is of such a character as that members of the community may lawfully traverse it in boats, they may also resort to it for the purpose of taking fish from its waters, albeit the title to the bed of the stream is in the riparian proprietor.

This rule has the distinct merit of being in accord with the universal custom of the state from which the present controversy comes. The General Assembly of the State of Missouri have prohibited taking fish from any *private pond* or other artificial waters (Sec. 3654 Rev. Stats. Mo. 1919) and have forbidden *hunting and trapping* on the "*enclosed, improved* or *cultivated*" lands of another without consent of the proprietor (Laws 1913, p. 224 R. S. Mo. 1919, Secs. 5662-5663; Laws 1911, p. 202), but have gone no further.

There are, of course, many small streams in the state to which members of the community cannot resort without making use of the banks of the stream and without, therefore, trespassing thereby upon the rights of the riparian proprietor. It is not doubted but that, as to all such, the rights of

the riparian proprietor are superior to those of the community. But there are numerous and rather important streams in the state which are not navigable in the sense that the state in its sovereign capacity holds title to the bed of the waters to the exclusion of the riparian owner, but which are, nevertheless, subject to the public right of user. Of these, some of the more important are the Saint Francis, the upper waters of the Black, the upper waters of the Current, Jack's Fork, Gasconade, Big Piney, Meramec, Eleven Point, Burbois and Little River, the *locus in quo*. These are all streams useful for rafting, logging, and kindred purposes, and for travel with light boats propelled by hand or small gas engines, and are all more or less in use for these purposes. None of them, however, are of such size and importance as that the bed of the stream is excluded from private ownership and vested in the sovereignty. *And, as to all of them, for such a length of time as that the memory of man runneth not to the contrary, those so inclined have fished their waters from small boats at will, with no thought on the part of anyone that the rights of the riparian proprietor were thereby infringed,* notwithstanding his undoubted technical ownership of the bed of the stream. If the contention of the plaintiff in error in this case is right, then this universal custom of the country is all wrong. The common law is but the com-

posite of the usages and customs of the country. As Mr. Justice Baldwin said in Strother v. Lucas, 12 Peters 445:

> " 'Custom is the law or rule which is not written, and which men have used for a long time, supporting themselves by it in the things and reasons with respect to which they have exercised it. * * *' "

The universal custom of the country in Missouri, and, indeed, throughout the Middle West and South confirms the views of the Wisconsin and Michigan Courts on the subject here dealt with. That the customs here and in England are different in that respect goes without saying; that the rules of law may be found to likewise differ is not improbable. It is confidently believed that, according to the fundamentals of American jurisprudence, particularly as administered in the Western and Southern states, and having in view the customs of the people, those streams to which the public have the right to resort are subject to the public right of fishery, even though the bed of the stream be private property.

Of this class is the Little River. Without restating the facts it seems to us that it is a stream which both from its characteristics and the uses which have been made of it is fairly subject to the public right of user. If so, the plaintiff's assignors have no

lawful complaint against even those who took mollusks from its waters, much the less against the defendants who purchased the shells in as close an approach to the market overt as we have in this country.

IV.

Implied License.

For a long number of years, as the testimony in this case shows without contradiction, the public have been resorting to this stream for any purpose which pleased them. They have used it with their small boats as a way; they have fished up and down its course as a means of livelihood; they have resorted to it and shot wild fowl for pleasure and profit; and have trapped fur-bearing animals along its borders. Since 1907, when the Little River mussel shell first came into the market, the citizens of that community who felt so disposed have gone upon the stream, and openly and publicly taken the mussels living therein, extracted them from the shell and shipped the latter to market, without let or hindrance from any riparian proprietor, not excluding the plaintiff's assignors. The lands of plaintiff's assignors seem to be mostly if not entirely timbered lands, unenclosed and unimproved. During all the time, at least that this mussel industry was being

carried on, the plaintiff's assignors had an agent and representative upon the premises who knew all that was transpiring. No complaint of any character was ever made with respect to removing these mussels until after defendants had bought and paid for the shells and shortly before this action was begun.

Even assuming that the public had no right to resort to the stream for such purpose or for any purpose without the consent of the proprietor, nevertheless such course of conduct on the part of the plaintiff's assignors conferred on those who were so doing an implied license which prevents the maintenance of this action, or any other action of like kind, until the license were withdrawn by some sort of fair notice.

Marsh v. Colby, 39 Mich. 626, is quite of interest in this connection. It is of interest to note that this opinion was concurred in by no less than Judge Cooley and Judge Campbell, two shining landmarks of American jurisprudence. This was an action in trespass brought by the landowner against the defendant, who had gone fishing in a small inland lake embraced entirely within the boundaries of the plaintiff's farm. This was entirely private property and there was no question about the title of the plaintiff to the lake. For a long period of time, however, the public had gone to this and other similar lakes in the vicinity and taken fish as they chose, without any

complaint on the part of the proprietors. It was held that these facts created an implied license which could not be withdrawn without notice or warning to the community to stay off the premises. The opinion of the Court on that subject reads thus:

> "The small lake or pond on which the alleged trespass was committed was almost entirely inclosed within the lines of plaintiff's farm. Whatever question might arise respecting the right to exclusive fisheries in larger bodies of water, the right of the landowner to the exclusive control of small bodies thus situated would seem clear.
>
> "It has always been customary, however, to permit the public to take fish in all the small lakes and ponds of the state, and in the absence of any notification to the contrary, we think anyone may understand that he is licensed to do so. No such notification appears in this case, and we therefore hold that the defendant was not a trespasser in passing upon plaintiff's land with the intent to take fish, having no knowledge that objection existed to his doing so."

The case of Knowles v. Dow, 22 N. H. 387, was an action in trespass q. c. f. for entering plaintiffs' premises and carrying away sea-weed. The defendant pleaded a custom of the inhabitants of the Village of Hampton to accumulate sea-weed on the plaintiffs' premises at the point in question and to move the same therefrom at pleasure. He also

pleaded a license to himself to do the same thing. The Court held that upon the facts both pleas were well taken. The evidence with respect to the custom was that for twenty years prior to the act in question some of the inhabitants of the Village of Hampton at their pleasure had accumulated sea-weed and deposited the same on the defendant's land at the point under inquiry. It was held that this custom had subjected the lands of the plaintiffs' to an easement in behalf of the inhabitants of the village to do the thing complained of. We quote these excerpts from the opinion on that subject:

> "The plea is of a custom to deposit the sea-weed, and carry it away at all times of the year, at the defendant's free will and pleasure. The evidence of John Page is that they hauled it there, and left it when they had got more than they wished to haul home, until it should be convenient for them to remove it. This certainly shows the custom substantially as alleged. * * *
>
> "The custom is alleged in the plea to be an immemorial custom, and the evidence in this case shows that there had been a usage to procure the sea-weed for more than twenty years. This evidence is sufficient. A regular usage for twenty years, unexplained and uncontradicted, is sufficient to warrant a jury in finding the existence of an immemorial custom: Rex v. Joliffe, 2 Barn. & Cress., 54; Gray v. Bond, 2 Brod. & B. 667."

The Court also held that the proof offered by the defendant that he and others had, for a long period of time, been doing the thing complained of an plaintiffs' land, without objection from the landowner, was sufficient evidence to go to the jury as to an implied license in the defendant to continue to do the thing until such time as the landowner revoked the license. We quote this excerpt from the opinion, dealing with the question of implied license:

> "The Court also ruled that a customary right to do anything on the land of another was a right adverse to the rights of the owner of the soil. This, however, was said only as introductory to the rest of the sentence—'and must have been acquiesced in by him.'
>
> "The authorities are that a custom originates in permission: Bac. Abr., Customs, A. Still it is in its nature adverse. It is a right which the owner of the soil permits to be exercised upon his land; and he must have acquiesced in it in order to give it validity; because the custom must not have been the subject of contention and dispute. If it be not an adverse right, why need its exercise have been acquiesced in? We do not see that it can be otherwise regarded.
>
> The defendant here first set up the plea of custom. If he failed in proving that, then he relied on proof of a license. *Surely the evidence stated in the case, of his repeatedly going on the land, and doing acts there with the knowledge of and without any objection from the plain-*

tiffs is competent to be considered and weighed by the jury, as tending to show a license. He might say, 'All the inhabitants of Hampton did these acts; but if I cannot prove that they did so, and if I fail in showing a custom, at least when I did them myself the plaintiffs assented to them, and so I had a license.' "

The case of Driscoll v. Newark and Rosendale Lime & Cement Co., 37 N. Y. 637, was an action for the death of plaintiff's intestate from an explosion in the defendant's quarry. The statement of the facts is meagre; but it appears that there was a pathway across the defendant's premises, which had been used by the plaintiff's intestate and others for a long period of time without objection, and it would seem that the plaintiff's intestate suffered death while traveling this way from an explosion in defendant's quarry in the course of the prosecution of its business.

Woodruff, J., who wrote the opinion of the New York Court of Appeals, said this on the subject here in hand:

"The intestate was not a trespasser, whether killed when he was on the defendants' land, or on the land whereof the fee belonged to his employers. The habitual use of the foot-path across the quarry lots for many years without objection, warrants a finding of license from the defendants to cross their land to go to his house."

Stevens v. Howerton, 49 Ind. App. 151, was an action in trespass for entering upon the plaintiff's premises and cutting and removing timber therefrom. The defendant pleaded an implied license to do the thing complained of, as to which the Indiana Court said this:

> "An implied license partakes of the nature of an estoppel, and may be found to exist from the inducements and representations of the owner, or from silence, where an owner sees and knows the extent of an act or acts done upon his property, and fails to object thereto (Tiedeman on Real Property [3d Ed.] Sec. 468; Vol. XVIII, A. & E. Enc. Law, pp. 1132-1134; Noftsger v. Barkdoll *et al.*, 148 Ind. 531-535, 47 N. E. 960)."

Noftsger v. Barkdall, 148 Ind. 531, was an action by a landowner to enjoin the defendant from using a way over the premises of the former which led to a certain planing mill. The premises were unenclosed, and it appeared in the evidence that the defendant and others had been in the habit of using this pathway without objection, in order to reach this planing mill, for a considerable period of time. The Indiana Supreme Court on such facts held that the use of the way under such circumstances was under an implied license, which, however, was revocable at the will of the landowner. Concerning that subject, the Court said:

"The mere fact that appellee, Hoover, the owner of said lots, knew that appellant and his customers were using the driveways around each side of the planing mill in going to and returning from said elevator to Center street, and that he did not object thereto, and, even if he, by his silence, consented thereto, would amount to no more than a naked license, which is revocable at pleasure."

The case of Thayer v. Jarnes, 44 Wis. 388, was an action to recover damages for injuries to the plaintiff's team while he was driving across the defendant's premises. It appears from the report of the case that there was some open ground on the defendant's premises, which for a number of years had been openly used by various teamsters including the plaintiff, as a way. There had never been any express sanction by the defendant of this use, nor had there ever been any open objection on his part. Defendant threw some harmful acids on the way, and the plaintiff drove over it without knowledge of the fact, and as a result thereof his team suffered injuries. The Wisconsin Court on these facts held that the user of the defendant's premises which had previously transpired without objection on his part had created an implied license to continue the use, which he could not destroy without notice, and that the plaintiff was entitled to recover.

We quote these pertinent remarks of the Court from page 391 of the opinion cited:

> "The plaintiff did not attempt to show any right of way there by grant or prescription, but he did prove a state of facts from which the jury might well have found that he had a license from the owners and lessees of the block, including the defendants, to drive there when doing the work of Webster Bros. Such a license, until revoked, is as effectual to sustain this action as would be proof that the alleys or open spaces are public or private ways by grant or prescription, over which the plaintiff had a lawful right to drive his team."

In the light of these adjudications it results that if we concede the entire right of the plaintiff's assignors under ordinary circumstances, as fully and completely as it is claimed here, it yet remains that, without some notice to the community that privileges previously enjoyed were withdrawn, they cannot successfully contend that that was a trespass which had thitherto received their apparent sanction. They cannot lie by and observe the inhabitants of this community openly engage in reclaiming mussels from this river and as openly shipping the shells thereof to market, and after persons have dealt with the shells in good faith, insist that all which was done in that behalf was done without authority and must be undone. Such a course commends itself neither to

our conception of right action, nor to correct rules of the law.

This situation was pleaded in the answer as an estoppel (Rec., p. 15). It was urged upon the Court of Appeals in brief and argument, but was not noticed in either of the two opinions filed by that court. In the first, the result of which was to affirm the judgment below on other grounds, it was perhaps unnecessary for the Court to notice this proposition. In the last opinion the question was probably overshadowed by larger and more fundamental questions, in consequence of which it must have been overlooked. However, that may be, the facts and the rules of the law, upon which the contention rests are alike beyond question, and alike lead to the affirmance of the judgment below, independent altogether of other considerations which have been urged.

For which reasons it is respectfully submitted that the judgment of the Court of Appeals ought to be reversed and that of the District Court affirmed.

William Hoffman
Arthur Hoffman
Lon O. Hocker
Frank H. Sullivan

For Petitioners.

NOV 7 1921
WM. R. STANSBURY

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 280 61

JAMES S. McKEE, NELLIE CANNON BLIVEN, Executrix of WILLIAM E. BLIVEN, deceased; and McKEE & BLIVEN BUTTON COMPANY,

Petitioners,

vs.

BENJAMIN GRATZ,

Respondent.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR NATIONAL ASSOCIATION OF BUTTON MANUFACTURERS, AMICUS CURIAE

FRANK M. SWACKER,
Counsel for NATIONAL ASSOCIATION OF BUTTON MANUFACTURERS, AMICUS CURIAE.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 282.

JAMES S. MCKEE, NELLIE CANNON BLIVEN, Executrix of William E. Bliven, Deceased; and MCKEE & BLIVEN BUTTON COMPANY,

Petitioners,

vs.

BENJAMIN GRATZ,

Respondent.

STATEMENT.

Upon leave of Court heretofore granted, this brief is filed on behalf of the National Association of Button Manufacturers, an unincorporated association comprising practically ninety per cent of the fresh-water pearl button industry.

The buttons manufactured by this industry are made from the shells of mussels, the subject of the controversy in this case.

If the last decision of the Circuit Court of Appeals correctly states the law applicable to the situation, these manufacturers are liable to innumerable suits in distant communities for the value of shells purchased by them in the open market.

The case briefly stated is as follows:

The petitioners (defendants below) purchased several carloads of mussel shells from one W. A. Blake, to them theretofore a stranger, at Wardell, Missouri, loaded on cars on railroad tracks, and ordered the same shipped to their factory at Muscatine, Iowa.

It appeared upon the trial that Blake had taken the mussels from a stream known as Little River (which the Court found to be non-navigable) at places where it flowed through land belonging to assignors of respondent (plaintiff below). These mussels are migratory, and found by the Court to be, as they undoubtedly are, animals *ferae naturae*.

The evidence shows that Blake, together with men in his employ, went upon the lands of the respondent's assignors and removed the mussels from the stream to the banks, where the meat was boiled out and the shells drayed to the railroad station at Wardell and loaded on the cars. It further shows that Blake did this under the eyes of the caretaker of the property; that others were doing the same; and that said caretaker even hired his teams out in some instances to do the draying.

There is no evidence indicating that the petitioners had instigated or suggested to Blake to go upon the respondent's assignors' lands for these shells; nor that the petitioners had any knowledge of what, if any, arrangement may have subsisted as between Blake and respondent's assignors. Indeed, so far as the record shows, had petitioners concerned themselves to speculate on the origin of the shells, they would have been warranted in assuming that Blake may have been licensed in the prem-

ises. The evidence indicates, however, and the Court so found, that Blake was in fact a trespasser so far as having any legal right to enter upon the lands of respondent's assignors. The evidence further shows that the custom throughout the territory in which such shells are found, *i. e.*, the Mississippi River and its tributaries, and tributaries thereof, from Mississippi to Wisconsin and Minnesota, and from Pittsburgh to Omaha and Kansas City, is universal for mussel gatherers to go upon waters flowing through private lands without license for the purpose of taking such mussels, and that in only one other instance was complaint against such course ever known to have been made.

As to the last car purchased, the evidence indicates that petitioners may have been on notice concerning a claim of trespass by respondent's assignors, and that car may therefore be subject to other rules than those applicable to the principles involved in this case, which are of the utmost importance, so this brief will be confined to those principles.

The conclusion of the Circuit Court of Appeals is, in substance, that the mussels were animals *ferae naturae,* and that Blake was a trespasser, and as such could acquire no property in them; that, subordinate to the property in the State declared by its Constitution and statutes, respondent's assignors had a qualified right to said mussels, and that since Blake was a trespasser he could not under ordinary common-law principles acquire a property in them by reduction to possession *by wrongful means,* and that *therefore* a property in them arose in favor of respondent's assignor upon their reduction to possession by Blake; that Blake, having no property,

could convey no title to petitioners who were therefore liable to respondent's assignors for conversion to the extent of the value of said mussels at the time of taking.

If this is a correct conclusion of the law applicable to the situation, it follows that respondent's assignors would have a right not alone against petitioners, but could follow the buttons on to the shirt manufacturer, or to the retail drygoods dealer, or the wearer of the garment upon which they may be sewn. Upon the same principle, the wearer of practically any fur coat in this country would be liable at any time to a suit for conversion by the owner of land upon which a trapper trespassed to catch the animal; for it is notorious that trappers of fur-bearing animals usually capture them on wild lands belonging to others.

Argument.

There is no claim or even pretense that respondents' assignors ever had possession of the mussels or their shells and consequently an action for conversion would lie only upon a showing of absolute title which the Circuit Court of Appeals concludes as matter of law they had.

The principal authority upon which it relies is *Blades* v. *Higgs, 11 H. L. Cas. 621,* and certain State cases which seem to have followed it:

The following quotation from Lord Chancellor Westbury's decision substantially covers the basis of the rule:

> "My Lords, when it is said by writers on the Common Law of England that there is a qualified

or special right of property in game, that is in animals *ferae naturae* which are fit for the food of man, whilst they continue in their wild state, I apprehend that the word 'property' can mean no more than the exclusive right to catch, kill and appropriate such animals which is sometimes called by the law a reduction of them into possession.

"This right is said in law to exist *ratione soli*, or *ratione privilegii*, for I omit the two other heads of property in game which are stated by Lord Coke, namely, *propter industriam* and *ratione impotentiae*, for these grounds apply to animals which are not in the proper sense *ferae naturae*. Property *ratione soli* is the common law right which every owner of land has to kill and take all such animals *ferae naturae* as may from time to time be found on his land, and as soon as this right is exercised the animal so killed or caught becomes the absolute property of the owner of the soil.

"Property *ratione privilegii* is the right which, by a peculiar franchise anciently granted by the Crown in virtue of its prerogative, one man had of killing and taking animals *ferae naturae* on the land of another; and in like manner the game, when killed or taken by virtue of the privilege, became the absolute property of the owner of the franchise, just as in the other case it becomes the absolute property of the owner of the soil.

"The question in the present case is whether game found, killed, and taken upon my land, by a trespasser becomes my property as much as if it had been killed and taken by myself, or my servant by my authority.

"Upon principle there cannot, I conceive, be much difficulty. If property in game be made absolute by reduction into possession, such reduc-

> tion must not be a wrongful act, for it would be unreasonable to hold that the act of the trespasser, that is of a wrongdoer, should divest the owner of the soil of his qualified property in the game, and give the wrongdoer an absolute right of property to the exclusion of the rightful owner.
>
> "But in game, when killed and taken, there is absolute property in some one, and therefore the property in game found and taken by a trespasser on the land of A., must vest either in A. or the trespasser, and if it be unreasonable to hold that the property vests in the trespasser or wrongdoer, it must of necessity be vested in A., the owner of the soil." (*pp. 631, 632.*)

It may well be that as between the landowner and the trespasser, the trespasser would be estopped to attempt to assert title in himself, but the question here involved is not of the relations between the landowner and the trespasser, except incidentally, but is as to the property in the mussels as between the landowner and strangers to the trespass.

We think that the case above quoted (*Blades* v. *Higgs*) goes too far in assuming, first, that a property necessarily arose in animals *ferae naturae* as soon as they were reduced to possession, and second, that since, if by reason of his wrong, the trespasser could not acquire a property in them, it was a necessary corollary that the landowner did acquire a property in them.

As between landowner and trespasser, it is possible that the law would erect a fiction of agency under which the landowner might, as against a trespasser, assert title, because of the trespasser's being incapable of procuring

a title for himself by his wrongful act. But, even in such case, as between the landowner and a stranger to the trespass, the landowner himself would be estopped to deny the ostensible agency of the possessor to deal with the property. So that an assumption that the landowner acquired a property upon the reduction to possession by the trespasser, through the fiction of agency, does not avail to solve the question so far as a stranger is involved, and it becomes necessary to consider whether he acquired such property by any other operation of law.

In *Geer* v. *Connecticut, 161 U. S. 519*, this Court considered profoundly the status of property in animals *ferae naturae*.

Loose expressions are found in some of the State cases, as well as some of the English cases, to the effect that the owner of land has a qualified property in animals *ferae naturae*, and some of the State cases seem to consider the qualification involved as being merely subordination to the superior property of the State asserted by most of the States in their constitutions and game regulatory laws.

It is not accurate, however, to say that the landowner has a qualified property in wild animals; he has no property whatever in them so long as they are wild animals. But, as noted by this Court in *Geer* v. *Connecticut, supra*, and as stated by Lord Chancellor Westbury in *Blades* v. *Higgs, supra*, what he has is a qualified right *to obtain* a property in wild animals; and this right consists merely in the exclusive right to reduce them to possession *while they are upon his land*, whereupon—and then only—he obtains and has a property in them. And this "ex-

clusive" right is of course further limited by the declared ownership in the State to control such taking.

That the landowner has no property (qualified, even) in these animals, is shown by the fact that as soon as they leave his land and go upon the land of another—whether of their own free will or pursued by a hunter—he has absolutely no claim to them when they are reduced to possession on the land of another.

Blades v. *Higgs, supra.*

It has been held that a State cannot grant to the inhabitants of one county the right to take game, and deny that right to the inhabitants of other counties unless they pay a license fee.

Harper v. *Galloway, 58 Fla. 255.*

Recognizing the right of the people to reduce game to their possession wherever found, it has even been held that the owner of land has no action of trespass against one who takes game on his unenclosed land.

McCormico v. *Singleton, 2 Mill's Const. Rep. 244 (S. Car.).*

Broughton v. *Singleton, 2 Nott & McCord, 338 (S. Car.).*

The Constitution of the State of Vermont recognizes the right of its citizens to hunt upon any unenclosed land.

Vermont Constitution, Chap. 2, Sec. 40.

In these States even an action of trespass *quare clausum fregit* cannot be maintained against one who hunts upon the unenclosed lands of another. However, it is

usually recognized that the owner of land can maintain trespass *quare clausum fregit*, as it is only essential in such an action to prove a breaking of the plaintiff's close. But this does not entitle the owner of the land to maintain trespass *de bonis asportatis*.

In *Beach* v. *Morgan*, *67 New Hampshire 529*, it was held that the owner of the land could maintain trespass *quare clausum fregit* against one who entered his land and took fish therefrom, but that the amount of his recovery was limited to the damage done to the land and that he could not recover for the value of the fish taken.

Animals *ferae naturae* are not the subject of larceny.

Blades v. *Higgs*, *supra*.

And though it is said in that case that this is owing to the qualities of the crime of larceny, none the less it tends to show, as do the preceding cases, that there is not a property in such animals in favor of any individual, at least *until they are reduced to possession*.

Most writers speak of the question of a property in wild animals, as does *Cyc.*:

> "The ownership of wild animals, so far as they are capable of ownership, is in the state—not as proprietor, but in its sovereign capacity, as the representative of, and for the benefit of, all its people in common. Such animals become the subject of private ownership only so far as the people may elect to make them so."
>
> *2 Cyc., p. 306.*

This Court, in *Geer* v. *Connecticut*, *supra*, quoted at length from the ancient writers on the history of prop-

erty in wild animals. They show that, so far as there is any property in them, it is common to all the people. But they also show that it is rather a common right to reduce to possession than an actual property in them.

The rule that a landowner's right to reduce to possession expires with the escape of the animal to other lands is not limited merely to other lands within the realm. Although, as stated by the cases, the sovereign holds as a trustee for the people, even this holding is but a right to reduce to possession; for if they escape from one realm to another, that right likewise dies, and it was so held in

> *Behring Sea Arbitrators' Decision, 32 Am. L. Reg. 901, 903, 908 et seq.*

It would seem, therefore, upon these considerations, that the fact is that animals *ferae naturae* are in reality not property at all, just as at common law a corpse was not property. On the other hand, they are potentially property, and there are rights to reduce them to property.

As shown by the writers quoted in *Geer* v. *Connecticut, supra,* in European countries and in England the right to procure a property in them was originally vested in the people in common, but a superior right was asserted by the sovereign, who not only asserted such right in himself but the further right to grant his prerogative to individuals. It also appears that in England—except in so far as the sovereign had asserted and granted specially his prerogative—the right to reduce to possession was still common to the people.

Blades v. *Higgs, supra,* however, seems to go further than this, and to hold that the right to reduce to possession is exclusive in the landowner upon whose land the animals might be at the time of reduction to possession. It may be that such a holding is warranted in England, resulting from the principal referred to by this Court in *Geer* v. *Connecticut, supra, at page 527,* in a quotation from Blackstone:

> " 'There still remains another species of prerogative property, founded upon a very different principle from any that have been mentioned before; the property of such animals, *ferae naturae,* as are known by the denomination of *game,* with the right of pursuing, taking and destroying them; which is vested in the king alone and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren or free fishery.' "

If the case depends upon this prerogative grant, an exclusive right to take may inhere in the ownership of land by virtue of the king's grant, even though such right may be merely implied. If such is the fact, however, that case would be inapplicable in this country, because no such prerogative has ever been recognized here, but, on the contrary, as stated by this Court in *Geer* v. *Connecticut, at page 529:*

> "Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised,

> like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the State, as held by this court in *Martin* v. *Waddell, 16 Pet. 410,* represents its people, and the ownership is that of the people in their united sovereignty."

But, if *Blades* v. *Higgs, supra,* did not depend upon prerogative grant, we think then it goes beyond the true rule, so far as establishing a property in the animals is concerned, and that the true rule is as stated by this Court in *Geer* v. *Connecticut, supra, at page 523,* respecting the quotation from the Digest:

> "'* * * but he who wishes to enter into the property of another to hunt can be readily prevented if the owner knows his purpose to do so.' Digest, Book 41, Tit. 1, De Adquir. Rer. Dom.
>
> "No restriction, it would hence seem, was placed by the Roman law upon the power of the individual to reduce game, of which he was the owner in common with other citizens, to possession, although the Institutes of Justinian recognized the right of an owner of land to forbid another from killing game on his property, as indeed this right was impliedly admitted by the Digest in the passage just cited, * * *
>
> "This inhibition was, however, rather a recognition of the right of ownership in land than an exercise by the State of its undoubted authority to control the taking and use of that which belonged to no one in particular, but was common to all."

Continuing, this Court further said (*p. 523*):

> "In the feudal as well as the ancient law of the continent of Europe, in all countries, the right to acquire animals *ferae naturae* by possession was recognized as being subject to the governmental authority and under its power, not only as a matter of regulation, but also of absolute control. Merlin, *ubi sup.*, mentions the fact that, although tradition indicates that from the earliest day in France, every citizen had a right to reduce a part of the common property in game to ownership by possession, yet it was also true that as early as the Salic law that right was regulated in certain particulars."

Disregarding kingly prerogative which this Court has already stated has no application in this country, if it be true that there is a property in animals *ferae naturae* held by the sovereign as trustee for the benefit of all the people, it would seem then that the ancient rule must still prevail that any individual has a right at any time and place to reduce to possession and acquire ownership so long as he acts within the State's regulations concerning such animals. This is not inconsistent with, nor does it deny, the right inhering in the landowner to exclude the individual from coming upon his premises for the purpose. But this is a far cry from the conclusion that though the landowner fails to assert his right of preventing a trespass he thereby acquires a property in the animals reduced to possession by the trespasser, and that as against strangers to the trespass. It may be that the landowner would be entitled to prevent the removal of the animals after reduction to possession by the

trespasser while still upon his land. But there is no longer any conflict of authority upon the point that whatever the landowner's rights—whether merely to exclude trespassers, or whether a superior right to reduce to possession—they are unquestionably limited to reduction to possession upon his land, and no further.

Blades v. *Higgs, supra,* discredits the idea previously held, that, if they were wrongfully driven off his land on to another's, he still retains any rights in them, and concedes that whatever right attached to the land would be only to that land upon which taken. Indeed, any other conclusion would be utterly inconsistent with all the theories of title to animals *ferae naturae* inhering in land.

Geer v. *Connecticut, supra.*
Behring Sea Arbitrators' Decision, supra.

It may be that animals *ferae naturae* acquire the character of property upon being killed.

Some of the cases argue, as does *Blades* v. *Higgs, supra,* that, although a trespasser kill game and reduce it to possession, he can acquire no property in it by his wrongful act. Conceding, for the purpose of argument, that such is the case, it does not necessarily follow that the landowner therefore does acquire a property in them immediately upon their fall. Though it be conceded that the landowner, through his right to prevent a further trespass, or even by virtue of his alleged superior right thereto, may stop the trespasser and take the game, it is earnestly urged that he must do so while it is upon his land; failing which, he abandons whatever rights to property in the game he may have had. This of course does

not dispute his remaining right of action *quare clausum fregit* against the trespasser.

Conclusion.

We are not here attempting to assert a general right on behalf of trespassers to invade private lands of another and take property of value therefrom, with the liability of merely responding in damages for breaking a fictitious close—which damages might be incapable of proof—but we do urge that, when the equities are balanced as between a landowner who makes no attempt himself to reduce to possession migratory animals,—which might otherwise have moved off his land voluntarily—but idly or even ignorantly sits by and permits others to take and render useful such migratory creatures, following a universal custom of assumed right to do so, on the one hand, and an innocent purchaser of the shells in the open market, on the other hand, the latter ought not to be held liable in conversion upon an assumed property right in the landowner in the shells.

Respectfully submitted,

FRANK M. SWACKER,
Counsel for National Association of Button Manufacturers, Amicus Curiae.

Office Supreme Court, U. S.
FILED
APR 8 1921
JAMES D. MAHER,
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920

BENJAMIN GRATZ
Petitioner

vs.

JAMES S. MCKEE, *et al.*
Respondents

No. 828

Brief **Petition for Certiorari**

to review record

in the

United States Circuit Court of Appeals
(Eighth Circuit)

and

Concurrence in the Prayer of a Like Petition

Submitted herewith by the Respondents herein

S. MAYNER WALLACE
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920

Benjamin Gratz *Petitioner* vs. James S. McKee, et al. *Respondents*	**Notice**

To said Respondents, or to Frank H. Sullivan, Lon O. Hocker and Geo. F. Haid, Esquires, their Counsel of Record:

Please take notice that, on Monday, April 11, 1921, or as soon thereafter as Counsel may be heard, Counsel for Petitioner, in the attached Petition, will move the submission of same in the Supreme Court of the United States.

S. Mayner Wallace
Counsel for Petitioner

Due service of the foregoing Notice and a copy of the above mentioned Petition is hereby admitted.

Frank H. Sullivan

Lon O. Hocker

Geo. F. Haid
Counsel for Respondents

SUPREME COURT OF THE UNITED STATES

October Term, 1920

Benjamin Gratz, *Petitioner* vs. James S. McKee, *et al.*, *Respondents*	Petition for Certiorari to the U. S. Circuit Court of Appeals (Eighth Circuit)

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Benjamin Gratz, by counsel, respectfully concurs with and joins in the prayer of the Petition for the Writ of Certiorari, this day made, in this cause, to this Honorable Court, by the Respondents, James S. McKee, *et al.*, but not upon the grounds or for the reasons in said Petition alleged; and said Petitioner, Benjamin Gratz, by counsel, also respectfully petitions that such writ be granted, and makes and presents this his own Petition therefor as follows, to wit:

The Case

Petitioner instituted an action (Tr. 13) against Respondents to recover for the conversion by them of 307½ tons of mussel shells (used in the manufacture

of buttons); and it was alleged, and there was testimony to show, that Respondents were guilty of willful trespass. Petitioner, therefore, asserted a right to recover the value ($28,290.00) of the manufactured product, as the proper and lawful measure of damages.

The Court of Appeals has delivered *three* Opinions (Tr. 137, 153, 181) in "this most interesting controversy" (Tr. 124); and now, after re-hearing, has ruled (Tr. 153-162) that Respondents were liable for the value of the shells at the time of the conversion of same, but has attempted to foreclose, finally, Petitioner's claim to the higher measure of damages—contrary to a duly cited and controlling decision in this Court and in contravention of Petitioner's Constitutional right, as below specified.

Petitioner asserts that the evidence proves Respondents not only to have been willful trespassers in fact, but shows that their depredations in question were flagrantly and consciously tortious; that Respondents committed said trespass after they had asked for, and had been denied, a license to do as they did (Tr. 97-9); that they attempted, since this litigation began, to conceal and destroy evidence of their acts (Tr. 78-82); and, among other things, that they clandestinely shipped and converted one carload of said shells after the demand that preceded the filing of this action! (Tr. 33, 52-3.)

Yet the learned Court of Appeals has seen fit to make the following ruling (of which complaint is now made) in the concluding paragraph of its Opinion (Tr. 162):

> "In as much, however, as it appears that the trespass was not willful in a legal sense, but in a belief of right under a mistaken interpretation of the game laws of the State, * * * the recovery should be limited to the actual value at the time of the conversion, as disclosed by the evidence, instead of that of the manufactured product * * *."

It seems that the undisputed facts in this record show Respondents to have been willful trespassers as a matter of law; certainly, the most they may now claim is to have these facts, attendant upon their trespass, found by a jury, and the (*willful or innocent*) nature of said trespass determined by such finding.

The legal presumption is that said trespass was willful; much competent evidence tends strongly to show that it was willful; and this question, or issue, arising out of the facts of the case, should, at the new trial, be submitted to the jury. It should not now be decided by the Appellate Court.

The General Reasons

relied on in this PETITION are these, to wit:

1. The said ruling of the Court of Appeals is plainly contrary to that of UNION NAVAL STORES COMPANY v. UNITED STATES, 240 U. S. 284—a direct authority, squarely in point, duly cited.

In that case, YOUR HONORS, referring to the trespasser, said (p. 290):

> "He acted with full notice of the facts, and his mistake of law cannot excuse him."

Yet, in the case below, the trespass is characterized as non-willful because it is ruled (Tr. 162) that the trespassers acted

> "in a belief of right under a mistaken interpretation of the game laws."

2. As a matter of practice—involving Constitutional right—the said ruling cannot stand consistently with the law as expounded in SLOCUM v. NEW YORK LIFE INS. CO., 228 U. S. *l. c.* 376, *et seq.*; for the issue in question, like all other issues of fact, must go to the jury at the new trial. In other words, it is not competent for the Appellate Court thus to usurp **the**

jury's function, and decide the matter. But this, that Court has attempted to do, saying (Tr. 181):

> "*the evidence showed to our satisfaction that there was no willful trespass in the case at bar.*"

It is respectfully submitted that the Court should have gone no further than to state the proper measure of damages to govern the jury at the new trial.

A certified copy of the TRANSCRIPT of record is exhibited herewith by counsel for *Respondents*, with their application for the Writ of Certiorari, and Petitioner requests that SAID TRANSCRIPT be taken as and for his transcript of record on this *his Petition for the said Writ.*

WHEREFORE your Petitioner, by counsel, respectfully prays that issuance of your Honors' Writ of Certiorari herein be ordered to the end that the record in the case of "*Benjamin Gratz, plaintiff in error*, v. *James S. McKee, et al., defendants in error*, No. 5285, in the United States Circuit Court of Appeals for the Eighth Circuit, be certified and sent to this HONORABLE COURT for review and determination;

that the judgment of said Court be reversed, and for such other and further orders in that behalf, and such other relief, as may be appropriate.

And your Petitioner will ever pray, etc.

BENJAMIN GRATZ
Petitioner

S. MAYNER WALLACE,
His Counsel

St. Louis, Mo.
April, 1921

State of Missouri }
City of St. Louis } ss.

S. MAYNER WALLACE, the affiant, of lawful age, having first been duly sworn, deposes and says on his oath that he is counsel for BENJAMIN GRATZ, Petitioner in the foregoing Petition; that said Petitioner is not now within the State of Missouri; that affiant makes this affidavit as agent and for and on behalf of said Petitioner; that affiant prepared the foregoing Petition; that the facts stated in said Petition are true, as affiant verily believes, and that the said Petition is not made or presented for delay but in good faith and in the belief that the same is well founded in point of law.

S. MAYNER WALLACE

Affiant

Sworn to and subscribed by the above named affiant at said City of St. Louis, before me, the undersigned, this 5th day of April, A. D. 1921. My commission expires on the 30th day of July, 1921.

ELLA BOEHM

(Notarial)
(Seal)

Notary Public within and for the City of St. Louis, Missouri

OCT 9 1922
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

JAMES C. McKEE, NELLIE CANON BLIVEN, Executrix of William E. Bliven, Deceased, and McKEE & BLIVEN BUTTON COMPANY,
Petitioners,

vs.

BENJAMIN GRATZ.

No. 61.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONERS.

WILLIAM HOFFMAN,
ARTHUR HOFFMAN,
LON O. HOCKER,
FRANK H. SULLIVAN,
RALPH T. FINLEY,
For Petitioners.

ST. LOUIS LAW PRINTING CO., 415 N. Eighth St. Main 1819, Central 919.

INDEX.

Page

Statement 1
Points and authorities..... 3
Argument 6

List of Authorities Cited.

Baker v. Mersch, 29 Nebr. 227, 45 N. W., l. c. 688..3, 11
Carpenter v. Lingenfelter, 42 Nebr. 728, 60 N. W. 1022 .....3, 10
Feton v. United States, 96 U. S. 702..... 4
Fisher v. Brown, 70 Fed. 570.....4, 12
Furnace Co. v. Tie Co., 153 Mo. App., l. c. 449-450 4
Lewis v. Courtright, 77 Ia. 190, 41, N. W. 615...3, 4, 7
Louis Werner Stave Co. v. Pickering (Tex. App. 1909), 119 S. W., l. c. 334..... 3, 9
Pine River Logging Co. v. United States, 186 U. S., l. c. 294.....11, 12
Powers v. United States, 119 Fed. 562, l. c. 567...4, 12
Railway Co. v. Hutchins, 32 Ohio St. 571, 30 Am. Rep., l. c. 637..... 4
State v. Hussey (Me.), 11 Am. Rep. 209..... 4
State v. Massey (N. C.), 2 S. E. 445..... 4
Union Naval Stores v. U. S., 240 U. S., l. c. 291.. 13
United States v. Stock Yards Co., 162 Fed., l. c. 562 4
Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep., l. c. 659.....3, 4, 7
Wooden Ware Co. v. United States, 106 U. S., l. c. 444.....3, 12
Words & Phrases (2d Series), Vol. 4, p. 1294..... 4
1 R. C. L. 122, Sec. 8..... 3, 7
1 R. C. L. 123, Sec. 10.....4, 14
1 C. J. 385.....3, 4, 13

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

JAMES C. McKEE, NELLIE CANON BLIVEN, Executrix of William E. Bliven, Deceased, and McKEE & BLIVEN BUTTON COMPANY, Petitioners, vs. BENJAMIN GRATZ.	No. 61.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONERS.

STATEMENT.

Under the opinion of the Circuit Court of Appeals and the argument of counsel for respondent in support thereof, the principle is announced that in case of a reduction to possession by a trespasser of game or animals ferae naturae, the title to such game vests in the landowner on whose premises such game is reduced to possession by the trespasser.

This conclusion is reached upon the theory that the trespasser cannot be allowed to profit by his own wrong, and the case of Blades v. Higgs, 11 H. L. Cas. 621, and similar cases based thereon, are cited in support of that proposition.

As we read the record in this case, the facts here do not come within the principle announced by those authorities. We desire, therefore, to state briefly some additional principles concerning the rights of a trespasser and those claiming under him, and call the Court's attention to certain authorities in support thereof.

ADDITIONAL POINTS AND AUTHORITIES.

I.

That the Court erred in holding that the title to fish and game, taken by a trespasser, vests in the owner of the premises from which they are taken.

1.

A trespasser who has acted under mistake of right and without wrongful intent might acquire title to property by accession.

Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep., l. c. 659;
Louis Werner Stave Co. v. Pickering (Tex. App. 1909), 119 S. W., l. c. 334;
Lewis v. Courtright, 77 Ia. 190, 41 N. W. 615;
Carpenter v. Lingenfelter, 42 Nebr. 728, 60 N. W. 1022;
Baker v. Mersch, 29 Nebr. 227, 45 N. W., l. c. 688;
1 R. C. L. 122, Sec. 8;
1 C. J. 385.

And such rule is recognized and enforced in the Federal Courts.

Wooden Ware Co. v. United States, 106 U. S., l. c. 444;

Pine River Logging Co. v. United States, 186 U. S., l. c. 294;
Powers v. United States, 119 Fed. 562, l. c. 567;
Fisher v. Brown, 70 Fed. 570.

And in this connection it should be observed that the term "willful" is not synonymous with "unlawful and without right."

Furnace Co. v. Tie Co., 153 Mo. App., l. c. 449-450;
State v. Hussey (Me.), 11 Am. Rep. 209;
State v. Massey (N. C.), 2 S. E. 445;
Feton v. United States, 96 U. S. 702;
United States v. Stock Yards Co., 162 Fed., l. c. 562;
Words & Phrases (2d Series), Vol. 4, p. 1294.

2.

The test in such cases is whether or not the property taken has been changed in form or has been so enhanced in value by the labor and expenditure contributed by the trespasser that it would be unjust to permit the owner to recover the property in its converted form.

1 R. C. L. 123, Sec. 10;
1 C. J. 385;
Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep., l. c. 659;
Lewis v. Courtright, 77 Ia. 190, 41 N. W. 615.

3.

The fiction of title created by the general principle that a willful trespasser cannot acquire title as against the original owner by virtue of his own wrong cannot apply in this case, because (a) the shell gatherers acted in good faith upon a well-founded belief that they had a right to gather the mussels, and (b) the petitioners are innocent purchasers from an unintentional or inadvertent trespasser.

Railway Co. v. Hutchins, 32 Ohio St. 571, 30 Am. Rep., l. c. 637.

ARGUMENT.

I.

The testimony in this case unquestionably establishes the fact that for years prior to the alleged conversion people had been taking mussels from Little River on the theory that they had a right to do so, and that such mussels belonged to the person who gathered them. This was not only found to be the law by the trial court, but the Circuit Court of Appeals, in its first opinion rendered herein, held that these mussel gatherers acquired title to the mussels (Rec., pp. 130-133), and even in the final opinion by the Circuit Court of Appeals it is said:

> "Inasmuch, however, as it appears that **the trespass was not willful in a legal sense, but in a belief of right under a mistaken interpretation of the game laws of the state,** and, inasmuch as the property taken cannot be deemed part of the realty, within the meaning of the laws in such cases made and provided, the recovery should be limited to the actual value at the time of the conversion."

All of the authorities relied upon by respondent and cited on this subject in the last opinion of the Circuit Court of Appeals have to do with **willful** tres-

passers. From the earliest times the courts have distinguished between a **willful** trespasser and one who trespassed under a **belief of right.**

The rule is well stated in 1 Ruling Case Law 122, Sec. 8, as follows:

> "Innocent Trespasser.—Even in the case of an innocent trespass, if the materials taken can still be identified, and the labor and materials of the trespasser are not shown to have gone farther than the appropriated materials toward producing the present valuable chattel, the owner of the materials is still entitled to the chattel. **The weight of authority, however, favors the view that where no element of willfulness or intentional wrong whatever appears on the part of one who applied another's materials, and the identity of those materials has formally disappeared in the new product, the title passes to the innocent trespasser with right of compensation to the owner.**"

In discussing the accession of title by a trespasser who takes property under the belief that he has a right to take it, the Supreme Court of Michigan held, in Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep., l. c. 659, that enhancement of value will give such a trespasser title, and said:

> "**No test which satisfies the reason of the law can be applied in the adjustment of questions of**

title to chattels by accession, unless it keeps in view the circumstances of relative values. When we bear in mind the fact that what the law aims at is the accomplishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundred fold is of more importance in the adjustment than any chemical change or mechanical transformation, which, however radical, neither is expensive to the party making it, nor adds materially to the value. There may be complete changes with so little improvement in value that there could be no hardship in giving the owner of the original materials the improved article; **but, in the present case, where the defendant's labor, if he shall succeed in sustaining his offer of testimony, will appear to have given the timber, in its present condition, nearly all of its value, all the grounds of equity exist which influence the courts in recognizing a change of title under any circumstances.**

"We are of opinion that the court erred in rejecting the testimony offered. The defendant, we think, had **a right to show that he had manufactured the hoops in good faith,** and **in the belief** that he had the proper authority to do so; and, if he should succeed in making that showing, **he was entitled to have the jury instructed that the title to the timber was changed by a substantial change of identity, and that the remedy of the plaintiff was an action to recover damages for the unintentional trespass.**"

In Louis Werner Stave Co. v. Pickering (Tex. Ct. Ap.) (1909), 119 S. W., l. c. 334, it is said: .

> "The general rule is that the owner of property has the right to all that becomes united or attached to it by accession; but when such accession is produced by the labor of another, and the identity of the property is thereby changed and its value greatly increased, the right to the property in its changed condition depends upon whether the person converting it acts in good faith believing that the property was his at the time of the conversion. If taken under these circumstances, the title to the property in its changed condition passes by accession to the person by whose labor its value has been so increased, and the original owner can only recover the value of the property in its condition at the time of the taking."

In Lewis v. Courtwright, 77 Ia. 190, 41 N. W. 615, the plaintiff brought a suit in replevin for a quantity of hay cut by defendant from plaintiff's land under the honest belief that he had a right to cut it. The uncut hay was worth ten cents per acre and when cut was worth two or three dollars per acre. In holding that the title passed to the trespasser, the Court (41 N. W., l. c. 616) said:

> "It may be conceded, for the purposes of this opinion, that defendant had no valid authority to cut the grass and make the hay in question,

but there was evidence which justified the jury in finding that he believed he had such authority when he cut the grass. While he was at work on the land he was notified that he had not acquired a right to the grass. He at once desisted from cutting more, but finished making and stacking that already cut. The question we are called upon to determine is whether, under the facts of the case, the title to the hay vested in defendant. **It is shown that the value of the grass before it was cut was small**; some of the evidence tending to show that it was but eight to ten cents an acre. **Each acre yielded from a ton to a ton and a half of hay, which was worth in stack from two to three dollars per ton.** Under these facts, we think it would be manifestly unjust to hold that the ownership by the plaintiff of the grass gave him title to the hay. **It is true the hay in stack is the grass which belonged to plaintiff, cut and cured, and preserved for use; but the labor of defendant, rendered in good faith, under a claim of right, gave to the hay substantially all its value.** The grass was worth to plaintiff the price for which it would sell."

The rule is stated in the syllabus by the Court, in Carpenter v. Lingenfelter, 42 Neb. 728. 60 N. W. 1022, as follows:

"The doctrine of accession of property applied where one has willfully, as a trespasser, taken the property of another, and altered it in substance or form by his own labor. Where,

however, the appropriation was through a mistake of fact, and labor has been expended upon it which converts it into something very different from the original article, and greatly increases its value, and the value of the original article is insignificant in comparison with the new product, **the title to the property in its converted form will pass to the person who has thus expended his labor,** the original owner to recover the value of the original article" (Baker v. Meisch, 45 N. W. 685, 29 Neb. 227).

In Baker v. Mersch, 29 Neb. 227, 45 N. W., l. c. 688, trespassers were held to acquire title by accession to brick made by them on the land of another, while in good faith thinking they had a right to such land, and the Court said:

> "Where the appropriation of the property of another is accidental, as through mistake of fact, and labor has in good faith been expended upon it which converts it into something entirely different, and very greatly increases its value, the original article being comparatively of but little value, the title to the property will be held to pass to the person by whose labor the change has been wrought, and the original owner may recover the value of the article as it was before its conversion."

The general rule permitting accession of title in

favor of an innocent or unintentional trespasser is recognized and enforced in the Federal Courts.

> Powers v. United States, 119 Fed. 562, l. c. 567;
> Bolls Wooden Ware Co. v. U. S., 106 U. S. 432;
> Fisher v. Brown, 70 Fed. 570.

In Woodenware Co. v. United States, 106 U. S., l. c. 434, it is said:

> "On the other hand, **the weight of authority in this country, as well as in England, favors the doctrine that where the trespass is the result of inadvertence or mistake the wrong was not intentional, the value of the property when first taken must govern**; or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition."

In Pine River Logging Co. v. United States, 186 U. S., l. c. 294, this court recognized the rule here contended for, namely, that accession may occur in the case of an inadvertent trespass, and said:

> "It is not a case where an innocent purchaser can defend himself under that plea. **If it were, he would be liable to no damages at all, and no recovery could be had.** On the contrary, it is a case to which the doctrine of caveat emptor applies, and hence the right of recovery in plaintiff."

The generally stated rule that an innocent purchaser cannot acquire title from a trespasser refers to a **willful** trespasser. It is not in conflict with title by accession acquired by an unintentional or inadvertent trespasser. As said by this Court in Union Naval Stores v. United States, 240 U. S., l. c. 291:

> "One who **knowingly** takes the property of another cannot, by changing its form or increasing its value, or by commingling it with other property of his own, acquire title by accession. (The Distilled Spirits, supra; Silsbury v. McCoon, 3 N. Y. 379; 53 Am. Dec. 307, 315, note)."

That case, however, and the cases cited, clearly recognize the principle for which we contend.

In determining whether or not title passes to an unintentional trespasser, the Courts take into consideration the extent to which the form of the property has been changed or the extent of the enhancement in value as a result of the labor or expenditure of the trespasser.

In 1 C. J. 385 the rule is stated as follows:

> "Test of Relative Values. In some cases, in determining the question of title by accession, the test of relative values has been applied, and it has been said that there is no satisfactory test which does not keep this element in view. The principle is that where one person under a

mistake of right has by his labor, or by such labor and the addition of other materials, **increased the value of the property of another to an amount entirely disproportionate to its original value, he will acquire title thereto by accession,** the owner of the original materials being entitled only to compensation for their value. The controlling consideration in such cases is not, however, the fact of an increase in value, **but its degree,** or the relative values of the original materials and the expenditures made thereon, and just what this degree or proportion must be has not been and cannot be definitely stated; but it has been held that where the identity of the original article can be traced, a change of title cannot be effected in this manner unless the disproportion of values is so great as to make the injustice of a different rule clearly apparent."

And in 1 Ruling Case Law, 123, Sec. 10, in discussing the effect of enhancement in value by an innocent trespasser and under what circumstances such enhancement will give him title, it is said:

"Relative Values. No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstances of relative values. The fact of the value of the materials having been increased a hundred fold is of more importance in the adjustment than any chemical change or mechanical transformation, which, however radical, neither is expen-

sive to the party making it, nor adds materially to the value. When the right to the improved article is the point in issue, the question, how much the property or labor of each has contributed to make it what it is, must always be one of the first importance. **It is therefore the general rule that where it can be shown that the labor and materials of an innocent trespasser contributed more to the value of the present chattel than those materials which he took without intending a wrong, he is entitled to keep the chattel as his own, making, however, due compensation to the owner of the materials for what he took.** * * * **All that can be known is, that when the disproportion of the value of the material to that of the product is so great as to impress on the mind the justice of considering the material the accessory, and the production of the operator the substantive species, the thing belongs to the producer of the new species.** In addition to the relative values, the injury inflicted upon the owner by the trespasser, and the injustice of taking from the former his property, against his will, at its market value, should be considered, **and compared with the hardship the latter may suffer by the loss of his labor and other expenditures,** in determining whether this appropriation would be such gross and palpable injustice as to give the innocent trespasser the right to the property in its converted form."

It results from the foregoing authorities that the title to the shells when sold to the petitioners must

be determined with reference to the character of the trespass and the enhancement of value resulting from the labor and expenditures by Blake and his mussel gatherers.

The testimony on the part of the petitioners shows that the mussels in the river are practically worthless, and indeed, up to the summer of 1913, when the petitioners purchased the shells in question, there had been no market for them, even after being gathered, prepared and hauled to the market place (Rec., p. 85). A Mr. McClung, however, witness for the respondent, testified that in 1913 and 1914 he bought the mussels in place at $1.00 per ton (Rec., p. 39). After being prepared for market, however, these shells were sold for as high as $11.00 to $13.00 per ton, and the petitioners paid $9.00 a ton for the shells in controversy (Rec., pp. 38, 77). It is our position that it would be unconscionable under the facts of this case to say that these shell gatherers, who gave the shells practically all the value they had, did not acquire title as against the land owner, who could, at most, have received only a small amount per ton for the shells in the river. Under the authorities, we think that the land owner should be remitted to his remedy against the original trespasser for the value of the shells in the river. In that manner, as stated in the cases, the petitioners would receive the full value of their property and the innocent trespasser

and his vendee would receive the benefit of the enhancement in value resulting from gathering, preparing and conveying the shells to market. Any other rule under the facts of this case would result in manifest injustice.

The foregoing principles dispose of the argument upon which the finding of title in the petitioners is based; namely, that the landowner acquires title by virtue of the fiction of law, prohibiting the trespasser from taking advantage of his own wrong. The whole theory of the opinion on this question falls when it is considered in the light of the authorities establishing the rights of an innocent or inadvertent trespasser. The opinion is based upon the authorities dealing with **willful trespassers**. That such a fiction of law cannot be applied to an innocent purchaser from an unintentional trespasser is established by both reason and authorities.

The principle is well stated by the Supreme Court of Ohio in Railway Company v. Hutchins, 32 Ohio St. 571, 30 Am. Rep., l. c. 637, where it is said:

> "It is very true that the willful trespasser or thief can convey no title to one to whom he sells, however innocent the purchaser may be. **But the question right here is, what does 'title' in this connection mean?** The original owner has the 'title' to this timber, and as against the thief, the title to the results of the thief's labor. The wrongdoer, as it were, being estopped from set-

ting up any claim by virtue of the wrong he has done. Against the innocent purchaser from the thief, the original owner still has the 'title' to his timber, but by virtue of what does he now have 'title' to the thief's labor? **The estoppel, so to call it, being created by fraud or wrong, exists only against the one guilty of that fraud or wrong, which the purchaser is not, and while it is effectual against the wrongdoer, the reason of it does not exist as against the innocent man, as to whom it therefore fails. As Judge Cooley says, it does not comport with notions of justice and equity, that against those who have done no wrong, these owners should recover three times the value of what they have lost.** They have never spent one cent of money, nor one hour of labor, in changing this timber, worth one dollar, into cord wood worth three. All this was done by someone else, and why should the owners recover for it? If they are compensated for what they have lost, and all they have lost, they are certainly fully paid (Woolsey v. Seeley, Wright 360). And this is all they should be allowed to recover."

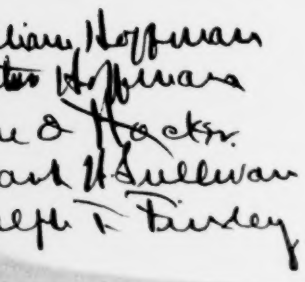
II.

In conclusion, we reaffirm the points made in our original brief, to the effect that under the law of Missouri the title to the mussels was in the state; that when reduced to possession they became the property of the persons gathering them, and not the property of the landowner. But, if we are in error

in this respect, the mussels certainly became the property of the unintentional trespassers by virtue of the gathering, preparing and transporting of said mussels to the market place, where their value was enhanced to at least nine times the value of the mussels in the river. These parties being entitled to hold the shells thus prepared as against the landowner, under any theory, they had a right to sell them to the petitioners, and the respondent's action for conversion must fail.

The petitioners desire also to again direct the Court's attention to the matter of implied license, which was not considered by the Circuit Court of Appeals, and which, we think, should estop the respondent and his assignors from maintaining this action. As we understand the record, this defense is sufficiently pleaded in the answer. It is true the Court struck out a conclusion of law therein, but this left the statement of the facts from which the law, itself, draws the conclusion (Rec., p. 16).

For the foregoing reasons we earnestly insist that the judgment of the Court of Appeals should be reversed, and that of the District Court affirmed.



WILLIAM HOFFMAN,
ARTHUR HOFFMAN,
LON O. HOCKER,
FRANK H. SULLIVAN,
RALPH T. FINLEY,
For Petitioners.

of stones, mineral, etc., "or other substance or material being part of the realty." P. 137.

7. Damages recoverable by the land owner for mussels taken by trespass but in a belief of right due to a mistaken interpretation of the state game laws, are limited to the value at the time of conversion. P. 137.

270 Fed. 713, affirmed.

CERTIORARI to a judgment of the Circuit Court of Appeals, reversing a judgment for the present petitioners, in an action for damages brought by the respondent Gratz, to recover the manufactured value of over 300 tons of mussel shells which were dug from a stream-bed on his land (then of his assignor) and converted into buttons; also for triple damages, under a Missouri statute.

Mr. Lon O. Hocker, with whom *Mr. William Hoffman*, *Mr. Arthur Hoffman*, *Mr. Frank H. Sullivan* and *Mr. Ralph T. Finley* were on the briefs, for petitioners.

The mollusks taken from the Little River were shell fish controlled by the same rules of law as other fishes. *Martin* v. *Waddell*, 16 Pet. 414; 11 R. C. L., p. 1015; *Moulton* v. *Libbey*, 37 Me. 472; *Caswell* v. *Johnson*, 58 Me. 164; *Weston* v. *Sampson*, 8 Cush. 764; First Opinion of Court of Appeals, 258 Fed. 335; Second Id., 270 Fed. 713.

For plaintiff to recover in this action, his assignors must have had prior possession of or plenary title to the mollusks or shells taken therefrom. *Northern Pacific R. R. Co.* v. *Lewis*, 162 U. S. 373; *United States* v. *Loughrey*, 172 U. S. 213.

The plaintiff's assignors could not maintain trespass against defendants merely because mollusks were taken by others from their premises and the shells thereof sold and shipped to defendants. *Brown* v. *Peaslee*, 69 N. H. 458; *Neild* v. *Burton*, 49 Mich. 53; *Talmadge* v. *Scudder*, 2 Wright (Pa.) 517; *Catlin* v. *Warren*, 16 Bradw. (Ill. App.) 418.

The land owner has no title to the wild animals in his forest, nor to the fishes in his stream. The ownership is in the sovereign. 19 Cyc. 988; *McCready* v. *Virginia*, 94 U. S. 394; 11 R. C. L., p. 105; 3 Minor Institutes, p. 12; Farnham on Waters, § 1426; *Parker* v. *People*, 111 Ill. 603; *Peters* v. *State*, 96 Tenn. 682; *State* v. *Thereault*, 70 Vt. 617.

The land owner takes no title to fishes or game reduced to possession by a trespass on his premises. *Geer* v. *Connecticut*, 161 U. S. 523; *Beach* v. *Morgan*, 67 N. H. 529; 11 R. C. L., p. 1039.

Both by the civil and common law, in the absence of inhibitory legislation, one who reduces game or fishes *ferae naturae* to possession, acquires title, though he so reduce them on the lands of another. *Geer* v. *Connecticut*, 161 U. S. 523-526.

It is within the power of the State to take unto itself whatever right the land owner might otherwise assert at common law to game or fishes reduced to possession by a trespass on his premises. *Geer* v. *Connecticut, supra; State* v. *Weber*, 205 Mo. 36; *State* v. *Heger*, 194 Mo. 707; *State* v. *Warner*, 197 Mo. 650.

Missouri has regulated the taking of fish and game for many years. *State* v. *Warner, supra.*

Under the legislation in that State, title to game and fishes taken in trespass vests, not in the proprietor of the premises, but in the State. Mo. Laws 1905, p. 139, reënacted as Laws 1909, p. 159, and now found in Rev. Stats. Mo. 1919, § 5581.

Title to the beds of public navigable streams in Missouri is in the sovereign. *Benson* v. *Morrow*, 61 Mo. 345; *State* v. *Longfellow*, 169 Mo. 109; *McKinney* v. *Northcutt*, 114 Mo. App. 146.

Title to smaller streams (such as the Little River) is in the riparian proprietor subject to the public right of user. Mo. Constitution 1875, Art. I, § 1; *McKinney* v. *North-*

cutt, 114 Mo. App. 146; *Weller* v. *Mining Co.*, 176 Mo. App. 243; *Stuart* v. *Clark*, 2 Swan (Tenn.) 9; *Gaston* v. *Mace*, 33 W. Va. 14; *Webster* v. *Harris*, 111 Tenn. 668.

The public right of user includes the public right of fishery. *Willow River Club* v. *Wade*, 100 Wis. 86; *Lincoln* v. *Davis*, 53 Mich. 375.

The custom of the particular community makes it so. *Strother* v. *Lucas*, 12 Pet. 445.

The facts show an implied license in the community to do on the premises what defendants' vendors did, valid until revoked by fair notice to desist. *Marsh* v. *Colby*, 39 Mich. 626; *Knowles* v. *Dow*, 22 N. H. 387; *Driscoll* v. *Lime & Cement Co.*, 37 N. Y. 637; *Stevens* v. *Howerton*, 49 Ind. App. 151; *Noftager* v. *Barkdall*, 148 Ind. 531; *Thayer* v. *Jarnes*, 44 Wis. 388.

A trespasser who has acted under mistake of right and without wrongful intent may acquire title by accession. *Wooden-Ware Co.* v. *United States*, 106 U. S. 432, 444; *Pine River Logging Co.* v. *United States*, 186 U. S. 279, 294; *Powers* v. *United States*, 119 Fed. 562; *Fisher* v. *Brown*, 70 Fed. 570. The term "wilful" is not synonymous with "unlawful and without right." *Furnace Co.* v. *Tie Co.*, 153 Mo. App. 449, 450; *State* v. *Hussey*, 60 Maine, 410; *State* v. *Massey*, 97 N. Car. 465; *Felton* v. *United States*, 96 U. S. 699, 702; *United States* v. *Stock Yards Co.*, 162 Fed. 562; Words & Phrases (2d Series), vol. 4, p. 1294.

The test in such cases is whether or not the property taken has been changed in form or has been so enhanced in value by the labor and expenditure contributed by the trespasser that it would be unjust to permit the owner to recover the property in its converted form. 1 R. C. L. 123, § 10; 1 C. J. 385; *Wetherbee* v. *Green*, 22 Mich. 311; *Lewis* v. *Courtright*, 77 Ia. 190.

The fiction of title created by the general principle that a wilful trespasser cannot acquire title as against the

original owner by virtue of his own wrong cannot apply in this case, because (a) the shell gatherers acted in good faith upon a well-founded belief that they had a right to gather the mussels, and (b) the petitioners are innocent purchasers from an unintentional or inadvertent trespasser. *Railway Co.* v. *Hutchins*, 32 Oh. St. 571.

Mr. S. Mayner Wallace for respondent.

The rights of the parties should be determined just as if the thing taken had been so much lime. After being dug, boiled and shucked, the shells were piled and stored, for from ten days to one month, on the same lands, before being taken to the factory.

But, if the law pertaining to the ownership of animals be applied, the earthy, harmless, inoffensive, phlegmatic mussel ought not to be classed as a wild animal; but, rather, as a tame or domestic animal, in which event the land owners' rights of property were, of course, absolute, at all times. *State* v. *Taylor*, 27 N. J. L. 117; *Fleet* v. *Hegeman*, 14 Wend. 42; *State* v. *Van Vlack*, 101 Wash. 503; *Duchess of Sutherland* v. *Watson*, 6 MacPher. 199 (6 Scot. Sess. Cas., 3d Ser., p. 199).

"Whether any particular animal be of one class or the other, is to be determined by our knowledge of the habits of the class to which it belongs, as derived from the general observation and experience of naturalists." 3 Minor Inst., p. 7. Dogs, *Sentell* v. *New Orleans & Carrollton R. R. Co.*, 166 U. S. 698; bees, *Parsons* v. *Manser*, 119 Iowa, 88; young pheasants, *Reg.* v. *Garnham*, 2 F. & F. 347; wild cattle, *Davis* v. *Green*, 2 Hawaii, 367.

Where a trespasser reduces a wild animal to possession, the same thereupon becomes the absolute property of the owner of the soil. Rabbits, *Blades* v. *Higgs*, 11 H. L. Cas. 621; grouse, *Lonsdale* v. *Rigg*, 11 Exch. 654; fish and game, *Arkansas* v. *Mallory*, 73 Ark. 236. See Behring Sea Arbitrators' Decision, 32 Am. L. Reg. & Rev. 901. *Geer* v. *Connecticut*, 161 U. S. 519, and *Beach* v. *Morgan*,

67 N. H. 529, distinguished. See *Percy Summer Club* v. *Astle*, 163 Fed. 1; *Hardin* v. *Jordan*, 140 U. S. 371.

The Missouri statute of 1905; § 6508, Rev. Stats. Mo., 1909; § 5581, Rev. Stats. Mo., 1919, providing that title to all birds, game and fish shall be in the State "for the purpose of regulating and controlling the use and disposition of the same," is not adverse to plaintiff's position, even if it be said, *arguendo*, that damages are sought for the taking of the mussel rather than for the shell. The opposite construction would render such an enactment unconstitutional, if applied in circumstances here disclosed. The statute refers only to game, fish and birds that are "not now held by private ownership," and was enacted after the plaintiff's assignors acquired the land. But the statute only intends to make effective the State's police-power-interest, not to affect the citizen's private-property-ownership, as developed in the course of the common law.

Since Magna Carta and the Charter of the Forest, the ownership of birds, fish and game, so far as vested in the sovereign, has been uniformly regarded, not in a proprietary sense, but as a trust for the benefit of all the people in common. *Hartman* v. *Tresise*, 36 Colo. 146; *Arkansas* v. *Mallory*, 73 Ark. 236; *Schulte* v. *Warren*, 218 Ill. 108; *Rogers* v. *Jones*, 1 Wend. 237; *State* v. *Blount*, 85 Mo. 547; *State* v. *Weber*, 205 Mo. 46.

The land owner's possession, and right to the possession, of the shells (dug and stored on their lands), as against defendants, who had no better, or any, right or title, is, in and of itself, sufficient. The *jus tertii* is not available to defendants. *Armory* v. *Delamirie* (Smith's L. Cas.), 1 Str. 504; *United States* v. *Loughrey*, 172 U. S. 219; *Peru Co.* v. *Harker*, 144 Fed. 673; *Rosencranz* v. *Swofford Bros. Co.*, 175 Mo. 518.

The fact of navigability *vel non*, under the present record, is a question which is probably not now open; the trial court found that the waters were not navigable.

The opinion of the Court of Appeals demonstrates that the waters were non-navigable in fact and in law. And see *Brewer-Elliott Oil Co.* v. *United States*, 270 Fed. 102; [s. c. 260 U. S. 77]; Act March 2, 1919, c. 95 § 4, 40 Stat. 1275, 1287; *Slovensky* v. *O'Reilly*, 233 S. W. 478. But, even if navigable, the rights of the parties would still be the same; for the general right of user of such a navigable stream is strictly limited to highway purposes. *Hobart-Lee Tie Co.* v. *Grabner*, 206 Mo. App. 96.

The public right of navigation does not include or give the right to fish, hunt or trap where title to the underlying land is privately held. Annotation, 11 A. L. R. 241; fish, *Schulte* v. *Warren*, 218 Ill. 108; muskrats, *Johnson* v. *Burghorn*, 212 Mich. 19.

That the plaintiff's assignors had the exclusive right of fishing, is clear from the foregoing, and from the following, authorities: *Hardin* v. *Jordan*, 140 U. S. 371; *State* v. *Blount*, 85 Mo. 547; *Thompson* v. *Tennyson*, 148 Ga. 701; *Hartman* v. *Tresise*, 36 Colo. 146; *State* v. *West Tennessee Land Co.*, 127 Tenn. 575; *Hooker* v. *Cummings*, 20 Johns. 90.

There was no plea of any custom or of any implied license. Custom, from which any benefit may be derived, must be a lawful custom. *Adams* v. *Clark*, 189 Ky. 279.

The right to hunt or fish asserted is a *profit a prendre;* and the law seems clear that "a claim by custom to enjoy a *profit a prendre* in the soil of another is invalid and insupportable, for the reason that to allow such a claim would result in the destruction of value in the subject of the profit." 9 R. C. L., p. 745.

The value of the manufactured product, into which the shells passed, furnishes the proper measure of damages recoverable under the first count; and the Missouri statute, allowing treble damages in certain instances, applies under the second count.

Defendants made no inquiry, concerning ownership, prior to their getting the shells. Their agent asked for,

but did not obtain permission. See *Union Naval Stores Co.* v. *United States,* 240 U. S. 284; *Mason* v. *United States,* 273 Fed. 135; *Gray* v. *Parker,* 38 Mo. 160; *Sligo Furnace Co.* v. *Tie Co.,* 153 Mo. App. 442; 7 A. L. R. 901, et seq; Rev. Stats. Mo. 1909, § 5448; Rev. Stats. Mo. 1919, § 4242; Statham's Abridgment (Klingelsmith's), vol. 11, p. 1253; *Duchess of Sutherland* v. *Watson,* 6 MacPher. 199 (6 Scot. Sess. Cas., 3d Ser., p. 199); *Parker* v. *Lord Advocate* [1902], 4 Sess. Cas., 5th Ser., p. 707; s. c. [1904], 6 Sess. Cas., 5th Ser., p. 37; *Marsh v. McNider,* 88 Iowa, 390; *Oregon Iron Co.* v. *Hughes,* 47 Ore. 313; *Barnett Co.* v. *Oil Co.,* 254 Fed. 481; Rev. Stats. Mo., 1919, § 7058; *Jones* v. *De Merchant,* 26 Man. 455; 28 D. L. R. 561; *Silsbury* v. *McCoon,* 3 N. Y. 379.

Mr. Frank M. Swacker, by leave of court, filed a brief as *amicus curiae.*

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit brought by the respondent, who is also a cross-petitioner, to recover the value of mussel shells removed from the lands of the respondent's assignor and manufactured by the petitioners into buttons. It was brought in a Court of the State of Missouri, but was removed to the District Court of the United States. There were two counts; one simply for the conversion of the shells and a second alleging that the shells were part of the realty and that the plaintiff was entitled to treble damages under Rev. Stats. Mo. 1909, § 5448. (Rev. Stats. Mo. 1919, § 4242.) At the trial the District Court directed a verdict for the defendants, and the judgment was affirmed by the Circuit Court of Appeals. 258 Fed. 335. The main question was disposed of on the ground that by the Statutes of Missouri, Rev. Stats. 1909, §§ 6508, 6551, the title to the mussels was in the State.

As to the second count it was held that the mussels were not part of the realty. Later, a rehearing was granted, and while the Court adhered to its former opinion on the second count, it rightly, as we think, held that the statutes declaring the title to game and fish to be in the State spoke only in aid of the State's power of regulation and left the plaintiff's interest what it was before. See *Missouri* v. *Holland*, 252 U. S. 416, 434. It assumed that the defendants were trespassers and sent the case back for a new trial on that footing, the damages to be confined to the value of the shells at the date of conversion and not to include that subsequently added by manufacturing them into buttons. 270 Fed. 713.

The mussels were taken alive from the bottom of what seems to have been at times a flowing stream, at times a succession of pools, were boiled on the banks and the shells subsequently removed. As to the plaintiff's title, it is not necessary to say that the mussels were part of the realty within the meaning of the Missouri Statutes or in such sense as to make the plaintiff an absolute owner. It is enough that there is a plain distinction between such creatures and game birds or freely moving fish, that may shift to another jurisdiction without regard to the will of land owner or State. Such birds and fishes are not even in the possession of man. 252 U. S. 434. 2 Kent, Comm. 349. *Young* v. *Hichens*, 6 Q. B. 606. On the other hand it seems not unreasonable to say that mussels having a practically fixed habitat and little ability to move are as truly in the possession of the owner of the land in which they are sunk as would be a prehistoric boat discovered under ground or unknown property at the bottom of a canal. *Elwes* v. *Brigg Gas Co.*, 33 Ch. D. 562. *Reg.* v. *Rowe*, Bell, C. C. 93. *Barker* v. *Bates*, 13 Pick. 255. This is even more obvious as to the shells, when left piled upon the bank, as they were, to

await transportation. *Northern Pacific R. R. Co.* v. *Lewis*, 162 U. S. 366, 378, 382. Possession is enough to warrant recovery of substantial damages for conversion by a trespasser. We say nothing about the character of the stream as to navigability. The jury at least might find that there was nothing in that to prevent the application of what we have said. We are slow to believe that there were public rights extending to the removal of mussels against the land owner's will.

But it cannot be said as matter of law that those who took the mussels were trespassers; or even wrongdoers in appropriating the shells. The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts at least of this country. Over these it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country. *Marsh* v. *Colby*, 39 Mich. 626. In Missouri the implication is fortified by the limit of statutory prohibitions to enclosed and cultivated land and private ponds. Rev. Stats. 1919, §§ 5662, 3654. There was evidence that the practice had prevailed in this region. Whether those who took these mussels were entitled to rely upon it, and whether, if entitled to rely upon it for occasional uses, they could do so to the extent of the considerable and systematic work that was done were questions for the jury. They could not be disposed of by the Court. The implication of a license of the kind that we have mentioned from general understanding and practice does not encounter the difficulties that have been suggested in implying a license from conduct alone in cases where the same conduct after twenty years might generate an easement, it being a plain contradiction to imply *ad interim* a license which would prevent the acquisition of a prescriptive

right. *Chenery* v. *Fitchburg R. R. Co.*, 160 Mass. 211, 212.

As to the rule of damages in case the plaintiff recovers, in the absence of a decision by the Supreme Court of the State we should not regard the mussels as part of the realty within the meaning of the statute relied upon in the second count, and so far as appears at present we see no reason for charging the defendants, if at all, with more than the value of the mussels at the time of conversion, as ruled below. *Wetherbee* v. *Green*, 22 Mich 311. *Wooden-Ware Co.* v. *United States*, 106 U. S. 432. *Union Naval Stores Co.* v. *United States*, 240 U. S. 284. The result is that this judgment of the Circuit Court of Appeals is affirmed, but not all the principles laid down by it, and that the case will stand for trial by jury in the District Court.

Judgment affirmed.

McKEE ET AL. *v.* GRATZ.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 61. Argued October 13, 16, 1922.—Decided November 13, 1922.

1. The Missouri statute declaring that title to all birds, game and fish shall be in the State, Rev. Stats. Mo. 1909, § 6508; 1919, § 5581; speaks only in aid of the State's power of regulation, leaving the land owner's property in these things otherwise unaffected. P. 135.
2. Unlike wild birds and fish, live mussels, which have practically a fixed habitat in the bottom of a stream and little ability to move, are in the possession of the owner of the land, as are, even more obviously, the shells taken from such mussels and piled upon the bank. P. 135.
3. Such possession is enough to warrant recovery of substantial damages for conversion by a trespasser. P. 136.
4. But a license to take such mussels from uninclosed and uninhabited places may be implied from custom, the more readily where statutory prohibitions are limited to enclosed and cultivated land and private ponds, as by Rev. Stats. Mo. 1919, § 5662, 3654. P. 136.
5. The existence of such custom and license, and whether it extends beyond occasional uses to systematic extraction of mussels in large quantities for commercial purpose, *held*, for the jury. P. 136.
6. Live mussels in a stream are not part of the realty within the meaning of Rev. Stats. Mo. 1909, § 5448; 1919, § 4242, allowing triple damages in certain cases for the digging up and carrying away